No. (1)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

COUNTY OF BERKS AND THE BERKS COUNTY BOARD OF ASSESSMENT APPEALS,

*Petitioners,*

*vs.*

MERRY J. MURTAGH, *et al.*,

*Respondents.*

*Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania*

## PETITION FOR WRIT OF CERTIORARI

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## I. QUESTIONS PRESENTED

1. Whether, by ignoring this Court's decision in National Private Truck Council, Inc. v. Oklahoma Tax Commission, 115 S. Ct. 2351 (1995), and its specific admonition that a prior decision by the Pennsylvania Supreme Court in this case requiring state courts to hear challenges to local taxes under 42 U.S.C. §1983 was incorrect, the Pennsylvania Supreme Court's decision to permit a taxpayer class action to proceed under §1983 for money damages so eviscerates the long-standing federal policy against interference with local taxation that review and reversal by this Court are necessary.

2. Whether the Court should grant the writ to establish a uniform national policy for determining municipal liability under 42 U.S.C. §1983 pursuant to Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), and its progeny in light of the Pennsylvania courts' decision that state legislative delegation of "final policymaking authority" for municipalities to county boards of assessment shields the municipalities from §1983 liability for their improper collection of local taxes.

## II. PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

The Petitioners are the County of Berks, Pennsylvania and the Berks County Board of Assessment Appeals, defendants in the proceedings before the trial court, appellees in the proceedings before the Pennsylvania Commonwealth Court and petitioners in the proceedings before the Pennsylvania Supreme Court. Petitioners have no parent companies or non-wholly owned subsidiaries requiring disclosure under Rule 29.6.

The following respondents were Plaintiffs in the proceedings before the trial court, appellees in the proceedings before the Pennsylvania Commonwealth Court and petitioners in the proceedings before the Pennsylvania Supreme Court: Merry J. Murtagh; Spencer Lee Cherashore, Frederick Murtagh; Mary S. Murtagh; Anthony Gigliotti; George Chovanes; Margaret Chovanes; Michael Chovanes; LRM Ziegenfuss, a Pennsylvania partnership; and Concetta C. Good.

The following respondents were additional defendants in the proceedings before the trial court, appellants in the proceedings before the Pennsylvania Commonwealth Court and respondents in the proceedings before the Pennsylvania Supreme Court: Boyertown Area School District; Daniel Boone School District; Exeter Township School District; Fleetwood School District; Governor Mifflin School District; Kutztown School District; Muhlenberg School District; City of

Reading School District; Schuylkill Valley School District; Wilson School District; Wyomissing Area School District; Hamburg School District; Twin Valley School District; Greenwich Township; Marion Township; Brecknock Township; Centre Township; Maxatawny Township; Caernarvon Township; Borough of Kutztown; Borough of St. Lawrence; Borough of West Lawn; Borough of Hamburg; Borough of Laureldale; Oley Valley School District; Borough of Centerport; Upper Bern Township; Borough of Bechtelsville; Borough of Kenhorst; Leesport Borough; Colebrookdale Township; Cumru Township; Muhlenberg Township; Upper Bern Township; Conrad Weiser School District; Borough of Wyomissing Hills; Borough of Birdsboro; Borough of West Reading, Township of Heidelberg, Township of Lower Heidelberg, Township of Oley, Township of Tilden, Township of Upper Tulpehocken; and Township of Douglass.

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## V. JURISDICTIONAL STATEMENT

The Court has jurisdiction pursuant to 28 U.S.C. §1257(a) over the Pennsylvania Commonwealth Court's May 26, 1995 decision dismissing all claims against the additional defendants and the Pennsylvania Supreme Court's November 22, 1995 order denying Petitioners' request for discretionary review of the Commonwealth Court's decision and for reconsideration of the Pennsylvania Supreme Court's decision in this action in light of this Court's intervening decision in National Private Truck Council, Inc. v. Oklahoma Tax Commission, 115 S. Ct. 2351 (1995).

## VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved in this petition and are set forth in the appendix pursuant to Rule 14.1(f): United States Constitution, Amendment XIV, §1; 42 U.S.C. §1983; 28 U.S.C. §1257(a); 28 U.S.C. §1341; Pennsylvania Constitution, Article VIII, §1.

## VII. STATEMENT OF THE CASE

This case involves the worst type of prohibited federal interference with local taxation. Here a class of Berks County, Pennsylvania taxpayers seeks to utilize 42 U.S.C. §1983 in state court in a manner that runs afoul of this Court's recent decision in National Private Truck Council, Inc. v. Oklahoma Tax Commission, 115 S. Ct. 2351 (1995), and the Court's earlier decisions on the long-standing principle of federal non-interference with local taxes. Pennsylvania's Supreme Court has permitted the taxpayers to proceed with their improper §1983 claims under its earlier decision in this case which was subsequently, and expressly, rejected in National Private Truck Council.

The taxpayers claim that the Berks County Board of Assessment Appeals ("Board") followed unconstitutional real estate assessment practices causing certain taxpayers to pay more than their fair share of local taxes to their townships, boroughs and school districts ("Municipal Defendants") and to Berks County ("County"). Plaintiffs filed this case in Pennsylvania state court as a class action under 42 U.S.C. §1983 to recover excess taxes they allegedly paid the Municipal Defendants and the County.

The complaint alleges, under the aegis of 42 U.S.C. §1983, that the Berks County property tax assessment system violated the Taxpayers' Equal Protection rights by assessing properties only when they

were sold. As a result, so the Taxpayers claim, recent purchasers of property had higher assessments (and therefore higher local taxes) than owners of comparable properties who had held their properties for substantial periods of time. Relying on Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336 (1989), the Taxpayers claim they were denied equal protection because they were required to pay "excess" taxes. The Taxpayers sued the Board, County and Municipal Defendants under §1983 for a "recovery of overpaid taxes" collected by the County and Municipal Defendants.

The Pennsylvania Supreme Court first considered the viability of the Taxpayers' §1983 claims in 1993. Murtagh v. County of Berks, et al., 535 Pa. 50, 634 A.2d 179 (1993), cert. denied, 114 S. Ct. 1397 (1994) ("Murtagh I") [Appendix, Exhibit B]. After the trial court denied their preliminary objections and certified its interlocutory order for appeal, the Municipal Defendants argued on appeal that the Taxpayers could not challenge local taxes under §1983 because Pennsylvania's statutory remedies adequately protected the Taxpayers' constitutional rights. The Municipal Defendants also argued they were not proper defendants to the Taxpayers' §1983 claims because they did not control the Board.

Although the Pennsylvania Commonwealth Court held the Taxpayers did not have viable §1983 claims, the Pennsylvania Supreme Court, in Murtagh I,

reversed, holding that state courts must entertain §1983 claims challenging the assessment and collection of local taxes. [Appendix, Exhibit B at 44A]. On remand, the Commonwealth Court, in a 4 to 3 decision, held that the Municipal Defendants were not proper defendants and ordered their dismissal from the case because, according to the majority, the Board did not have "final policymaking authority" for the Municipal Defendants as required for §1983 municipal liability under Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), and its progeny. Greenwich Twp. v. Murtagh, ___ Pa. Commw. Ct. ___, 659 A.2d 1083 (1995) ("Murtagh II") [Appendix, Exhibit C].

The dissent in Murtagh II argued that the majority misapplied this Court's decisions on municipal liability under §1983. [Appendix, Exhibit C at 83A-84A]. The dissent concluded that the Municipal Defendants were proper defendants because Pennsylvania's General Assembly had delegated "final policymaking authority" to the Board to make assessments on the Municipal Defendants' behalf. [Appendix, Exhibit C at 83A-84A].

Less than a month after the Commonwealth Court's decision in Murtagh II, this Court decided National Private Truck Council, Inc. v. Oklahoma Tax Commission, 115 S. Ct. 2351 (1995). Citing a long-standing "aversion to federal interference" with local taxes, 115 S. Ct. at 2354, this Court held that §1983 creates no claim for equitable or declaratory relief

(in a state or federal court) in cases involving local taxes where state law provides an adequate remedy for the deprivation of taxpayers' constitutional rights. Id. at 2355. Significantly, this Court expressly rejected the Pennsylvania Supreme Court's decision and analysis in Murtagh I. 115 S. Ct. at 2354 n.3.

The Taxpayers and the County[1] thereafter filed separate petitions asking the Pennsylvania Supreme Court to review both the Commonwealth Court's decision and its decision in Murtagh I in light of National Private Truck Council. The Pennsylvania Supreme Court refused to hear the appeals, leaving the Taxpayers and the County to litigate the Taxpayers' §1983 claims under Murtagh I, despite this Court's decision in National Private Truck Council rejecting the Murtagh I analysis.

The Pennsylvania Supreme Court's refusal to reconsider Murtagh I creates a conflict with National Private Truck Council in this case and others like it currently pending in Pennsylvania. See, infra at 10 n. 2. While Murtagh I holds that Pennsylvania courts must entertain §1983 claims involving local taxes, National Private Truck Council holds that state courts "must

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[1] For ease of reference, both the County and the Board are hereafter referred to as the "County," unless otherwise noted.

refrain" from providing remedies under §1983 if, as in Pennsylvania, state law adequately allows taxpayers to assert constitutional challenges to local taxes.

The County now asks this Court to resolve the conflict between this Court and the Pennsylvania Supreme Court over the viability of the Taxpayers' §1983 claims. Resolution of this issue may result in the dismissal of this action.

The County also seeks review of the Commonwealth Court's decision that the Municipal Defendants are not proper defendants to the Taxpayers' §1983 claims. The County asks the Court to resolve a conflict between the Commonwealth Court's decision and decisions of this Court and several federal Courts of Appeals over the scope of §1983 municipal liability under Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), and its progeny.

## VIII. REASONS FOR ISSUANCE OF THE WRIT

This case presents important issues in the enforcement of taxpayer rights under the Equal Protection Clause and the relationship between federal law and local taxation. Pennsylvania's appellate courts have created erroneously rules of law in this case that conflict with decisions of this Court on both the availability of a cause of action under §1983 to challenge the constitutionality of local taxes and on the scope of municipal liability under §1983. The Court should resolve these conflicts now to avoid future inconsistent results as taxpayers continue to assert Equal Protection Clause claims under Webster.

### A. The Avalanche of Litigation Following Webster and Murtagh I and the Erosion of the Federal Policy of Non-interference With Local Taxes.

Webster began an avalanche of litigation claiming unequal and therefore unconstitutional tax assessments. The improper application of Webster, as demonstrated in Murtagh I, in turn has caused an erosion of the long-standing federal policy of non-interference in local taxation. Thus, one reason to grant the writ is to stop the erosion of the important federal policies articulated in National Private Truck Council.

In Webster, this Court declared *unconstitutional a West Virginia county's practice* of assessing properties for local taxes only upon their sale. 488 U.S. at 344. The Webster court concluded that, under the facts of that case, the county's assessment practices violated the Equal Protection Clause because recently sold properties received higher assessments than comparable properties that had not been sold recently. Id. at 343-45. Significantly, Webster was not a §1983 case. Instead, the plaintiffs in Webster asserted constitutional claims through the available state law remedies. Webster does not authorize the use of §1983 to challenge local taxes.

In Webster's wake, taxpayers in Pennsylvania began filing class action suits in various counties to challenge the assessment and collection of local taxes under the Equal Protection Clause and the "uniformity" requirements of the Pennsylvania Constitution, Article VIII, § 1. In addition to the action in Berks County, similar suits were filed against at least four other counties in Pennsylvania.[2] Similar actions

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[2] Balazik v. County of Dauphin, 44 F.3d 209 (3d Cir. 1995); Behe v. Chester County Board of Assessment Appeals, 952 F.2d 66 (3d. Cir. 1991); Alderman v. County of Cumberland, No. 857-1994, Court of Common Pleas of Cumberland County; Brennan v. County of Wayne, No. 323-1994, Court of Common Pleas of Wayne County.

involving local taxes have been filed in other states as *well.*[3]

Unlike Webster, Murtagh I authorizes the use of a federal remedy (§1983) to challenge local taxes regardless of the adequacy of state law remedies. Murtagh I has been construed as making "it easier for taxpayers to bypass existing statutory procedures and bring an action directly in state court" under §1983. Balazik v. County of Dauphin, 44 F.3d 209, 218 (3d Cir. 1995). Murtagh I has been cited with approval by courts in other states as precedent for allowing taxpayers to pursue §1983 claims instead of remedies under state law. General Motors Corp. v. City of Linden, 279 N.J. Super. 449, 653 A.2d 568 (1995); Kerr v. Waddell, ___ Ariz. ___, 899 P.2d 162 (1994).

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[3] Similar suits include: Nordlinger v. Hahn, 505 U.S. 1 (1992); Wisconsin v. Board of Review, 191 Wis. 363, 528 N.W.2d 424 (1995); Pockrus v. Bella Vista Village Property Owners Assoc., 316 Ark. 468, 872 S.W.2d 416 (1994); Chasalow v. Board of Assessors, 202 A.D. 2d 499, 609 N.Y.S. 2d 27 (1994); Westminster Mgt. Corp. v. Louisiana Tax Commission, 593 So.2d 923 (La. 1992); Averback v. Board of Assessors, 176 A.D.2d 1151, 575 N.Y.S.2d 964 (1991); Midlouisiana Rail Corp. v. Louisiana Tax Commission, 588 So.2d 1163 (1991); Twp. of West Milford v. Van Decker, 235 N.J. Super. 1, 561 A.2d 607 (1989).

This case involves the worst type of federal interference with local taxation. Under Murtagh I, taxpayers may use a federal cause of action (§1983) to avoid Pennsylvania's carefully crafted statutory remedies, which include review by the Board and de novo review by the courts. Although these statutory remedies have been consistently found adequate for protecting taxpayers' rights to challenge the constitutionality of local taxes, Behe v. Chester County Board of Assessment Appeals, 952 F.2d 66, 68-70 (3d Cir. 1991) (collecting cases at 68-69), under Murtagh I, taxpayers may bypass these state remedies in favor of a federal claim in state court under §1983. Thus, Murtagh I has effectively replaced Pennsylvania's statutory scheme for local tax administration, including the use of administrative procedures for dispute resolution, with a federal remedy.

Murtagh II, in finding that the Municipal Defendants are not proper defendants, also interferes with Pennsylvania's statutory scheme for local tax administration by its erroneous interpretation of §1983. Pennsylvania law provides a detailed scheme for administering tax refunds necessitated by improper assessments. Specifically, under Pennsylvania's General County Assessment Law ("GCAL"), all taxing authorities who collected excess taxes as a result of an improper assessment are required to refund their share of the excess taxes. 72 P.S. §5020-518.1; Westinghouse v. Delaware County Board of Assessment Appeals, 72 Pa. Commw. Ct. 199, 456 A.2d 694 (1983). Thus,

Pennsylvania law allows taxpayers to recover from a municipality the excess taxes paid to that municipality because of an improper assessment. It does not insulate townships, boroughs and school districts from liability for tax refunds simply because the Board is a "county" board. Nor does it render the County liable to refund taxes collected by other taxing authorities.

Murtagh II, however, undermines Pennsylvania's statutory scheme through its erroneous decision that the Municipal Defendants cannot be liable for tax refunds under §1983 because the Board lacks authority to act on their behalf. Under Murtagh II, either (a) the Taxpayers cannot recover all of the alleged excess taxes, or (b) the County, if liable, must refund taxes collected and spent by other governmental authorities. Thus, the Murtagh II federal remedy (§1983) radically alters Pennsylvania's statutory scheme for local tax administration.

In light of Murtagh I and II, there is little left of Pennsylvania's statutory scheme for local tax administration. Instead, state law remedies are replaced by federal remedies under §1983, and the long-standing policy of federal non-interference with local taxation championed in National Private Truck Council is thoroughly eviscerated. This case therefore presents significant federal questions requiring review and resolution by this Court.

### B. The Court Should Resolve The Conflict Over the Viability of §1983 Claims Challenging Local Taxes.

The Court has, of course, not hesitated to grant certiorari to resolve conflicts between its decisions and decisions of other courts. E.g., Wilson v. Schnettler, 365 U.S. 382 (1961). The conflict between Murtagh I and National Private Truck Council could not be more profound. Indeed, in National Private Truck Council, this Court specifically referred to Murtagh I as representing the wrong approach to §1983. 115 S. Ct. at 2354 n.3. Most important, this Court rejected the Murtagh I court's erroneous conclusion that Fair Assessment in Real Estate Assn., Inc. v. McNary, 454 U.S. 100 (1981), had no applicability to §1983 claims in state court.

In McNary, the Court examined the long-standing federal policy of non-interference in local taxes reflected in the Tax Injunction Act, 28 U.S.C. §1341, which prohibits federal courts from entering injunctions or declaratory judgments in matters involving local taxes. E.g., California Grace Brethren Church, 457 U.S. 393 (1982); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943). The McNary court expanded the Tax Injunction Act's prohibitions on equitable and declaratory relief to §1983 claims for money damages because such claims present as much opportunity for federal interference with local taxation as claims for equitable or declaratory relief.

> Petitioners will not recover damages under §1983 unless a district court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment like that barred in Great Lakes. We are convinced that such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity. Moreover, the intrusiveness of such §1983 actions would be exacerbated by the nonexhaustion doctrine of Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed. 2d 492 (1961). Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety.

454 U.S. at 113-14.

The issue in Murtagh I was whether state courts are required to hear §1983 cases challenging the constitutionality of local taxes. [Appendix, Exhibit B at 30A]. The Murtagh I court held that McNary and the Tax Injunction Act were inapplicable to §1983 claims in state court. [Appendix, Exhibit B at 33A]. Perceiving

no danger of federal interference from a federal claim proceeding in state court, and claiming a lack of "direction from the United States Supreme Court," the Murtagh I court held that state courts must entertain §1983 challenges to local taxes. [Appendix, Exhibit B at 33A-34A, 42A, 44A].

In National Private Truck Council, the Court considered whether taxpayers may use §1983 in state court proceedings to obtain equitable or declaratory relief where state law provides adequate remedies. This Court's rejection of Murtagh I was thorough and complete. Indeed, the Court rejected each of the arguments the Pennsylvania Supreme court used to support its decision in Murtagh I.

First, in contrast to the Murtagh I court's rejection of McNary, this Court held that McNary had "particular relevance" to the issue because of the McNary Court's conclusion that "Congress never authorized federal courts to entertain damages actions under §1983 against state taxes" when state law provided adequate remedies. 115 S. Ct. at 2354-55. Second, the Court rejected the notion (embraced in Murtagh I) that §1983 claims must proceed in state court because the Tax Injunction Act applies only to federal courts. Id. at 2356 (the Tax Injunction Act is merely "a partial codification of the federal reluctance to interfere . . . .").

Third, the Court noted that the federal policy of noninterference is implicated by §1983 claims

in state courts because the intrusion of federal law into local taxation exists regardless of whether the federal remedies are awarded by a federal or state court. 115 S. Ct. at 2356. Thus, this Court rejected the Murtagh I court's decision that a §1983 action in state court presents no danger of federal interference.

National Private Truck Council framed the issue in straightforward terms: Does §1983 provide a claim for equitable or declaratory relief from local taxes where state law provides adequate remedies? The Court held that where state law remedies are adequate, there is no claim (in state or federal court) under §1983 for equitable or declaratory relief from local taxes.

> [T]he background presumption that federal law generally will not interfere with administration of state taxes leads us to conclude that Congress did not authorize injunctive or declaratory relief under §1983 in state tax cases when there is an adequate remedy at law.

115 S. Ct. at 2355 (emphasis added). While state courts may enjoin local taxes under state law, they "must refrain from granting federal relief under §1983" when there is an adequate remedy under state law. 115 S. Ct. at 2357.

McNary and National Private Truck Council leave no room for the type of claims asserted in this case. Under McNary, the prohibition against equitable and declaratory relief applies to §1983 claims for money damages involving local taxes. Section 1983 claims for money damages run afoul of the principle of federal non-interference with local taxation because such claims are as intrusive as claims for equitable or declaratory relief. 454 U.S. at 113-14.

National Private Truck Council in turn clarified that the principle of federal non-interference with local taxation applies not only to federal court cases but also to state court proceedings under §1983. 115 S. Ct. at 2354-55. Accordingly, under McNary and National Private Truck Council, there is no cause of action under §1983 -- in state or federal court -- to challenge local taxes if state law adequately protects taxpayers' constitutional rights.

Pennsylvania's statutory remedies, including review by the Board and de novo review by the courts, long have been found adequate for redressing constitutional violations from local taxes. E.g., Behe v. Chester County Board of Assessment Appeals, 952 F.2d 66, 68-70 (3d Cir. 1991). Accordingly, because Pennsylvania law provides adequate remedies, taxpayers have no cause of action under §1983, but instead must pursue their constitutional claims through the available state law remedies.

This case highlights the effects of ignoring the long-standing policy of federal non-interference in state and local taxation. As a result of Murtagh I and II, Pennsylvania's statutory scheme for local tax administration, together with its adequate protection of constitutional rights, is replaced largely by federal remedies under §1983. Moreover, the allocation of responsibility for tax refunds is altered dramatically. In short, state law is subverted merely because the Taxpayers chose to assert federal rather than state claims.

By refusing to reconsider its position in light of National Private Truck Council, the Pennsylvania Supreme Court has left the County (and the other government defendants in the similar Pennsylvania cases) to litigate §1983 claims pursued under Murtagh I. Because such suits conflict with National Private Truck Council and will lead to improper federal interference in local taxation, the Court should issue a writ of certiorari to resolve this conflict.

### C. The Municipal Defendants May Be Liable Under §1983 Because Of The Board's Final Policymaking Authority.

Because the Municipal Defendants were dismissed by the Commonwealth Court, a central issue in this case is whether the Board has "final policymaking authority" for the Municipal Defendants such that the Board's conduct is the Municipal Defendants' conduct

for the purposes of real estate tax assessments. Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986); Monell v. New York City Department of Social Services, 436 U.S. 658, 694 (1978). According to the Commonwealth Court, municipalities may not be liable if final policymaking authority, previously held by the municipalities, is delegated by the state to a "county" official or board. [Appendix, Exhibit C at 76A-77A].

The Commonwealth Court's decision conflicts with this Court's seminal decisions on municipal liability and decisions by the federal courts of appeals on delegation of "final policymaking authority" through legislative enactment. For this separate reason, the Court should grant certiorari to establish a uniform national policy on when states may delegate final policymaking authority for municipalities for purposes of §1983 liability.

Municipal liability for the acts of those who have final policymaking authority is a basic tenet of §1983, and was developed to prevent municipalities (like the Municipal Defendants here) from avoiding liability for constitutional violations by dispersing municipal responsibilities among numerous officials. City of St. Louis v. Praprotnik, 485 U.S. 112, 126-27 (1988). Where an official has "final policymaking authority" for a municipality, his or her conduct is the municipality's conduct for §1983 purposes. Pembaur, 475 U.S. at 483.

Under §1983, the Municipal Defendants' potential liability is not limited to liability for their "own" actions, but extends to the actions of those who act with "final policymaking authority" for the Municipal Defendants. Id. Nor can the Municipal Defendants be shielded from liability because the Board, which has final policymaking authority for the Municipal Defendants, is designated as a "county" board under state law. Praprotnik, 485 U.S. at 126-27.

Whether a particular official or governmental body has final policymaking authority for a municipality is determined by examining state law. Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989). In Pembaur, the Court explained that "[a]uthority to make municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority . . . ." 475 U.S. at 483. Similarly in Praprotnik, the court explained that state law may allocate policymaking authority in "a rich variety of ways" and "will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." 485 U.S. at 126-27.

In this case, the Pennsylvania General Assembly delegated final policymaking authority to the Board to make assessments on behalf of the Municipal Defendants. 72 P.S. §5344(a). The Board's conduct, for §1983 purposes, therefore, constitutes the conduct of the Municipal Defendants and makes them liable under

§1983 for the Board's assessment policies. Pembaur, 475 U.S. at 483.

A cursory review of Pennsylvania law on local real estate taxation shows why the Board has final policymaking authority to set assessments on behalf of the Municipal Defendants. The Municipal Defendants are all taxing authorities who generate the greatest part of their revenues by collecting real estate taxes. They tax by applying a millage rate -- which they alone determine -- to the assessments of real property in their taxing districts. E.g., 24 P.S. § 6-672. These assessments and the millage rates are the two factors the Municipal Defendants use to impose and collect real estate taxes.

Municipalities performed their own assessments before the Board was created. The Board was created to simplify and centralize assessment procedures by creating one entity to act for all taxing authorities (including the Municipal Defendants) and by giving taxpayers one uniform assessment for all local taxes.[4] 72 P.S. §5344(a).

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[4] The notes to 72 P.S. §5342 provide that the Act is intended to have certain effects including, "[A]bolishing existing boards, identifying the powers and duties of such board; regulating the assessment of persons, property and occupations for county, borough, town, township, school and poor district purposes . . .

Thus, the Board has the duty:

> [T]o make and have supervision of the making of annual assessments of persons, property and occupations now or hereafter made subject to assessment for taxation for county, borough, town, township, school, poor and institution district purposes . . . .

72 P.S. §5344(a) (emphasis added). As the trial court recognized, the General Assembly took assessment power from the Municipal Defendants and gave it to the Board -- a clear delegation of the Municipal Defendants' authority to the Board.

The Commonwealth Court recognized the delegation of final policymaking authority when it held that "the General Assembly, by legislative enactment, has granted directly to the Board and the County the authority to make municipal policy with respect to the supervision and method of real property assessments levied by" the Municipal Defendants. [Appendix, Exhibit C at 10]. However, the court failed to recognize

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[and] abolishing the office of ward, borough and township assessors, so far as the making of assessments and valuations for taxation is concerned . . . ." (emphasis added).

that this delegation of final policymaking authority through "legislative enactment" is the basis for the Municipal Defendants' liability under §1983 for the Board's assessment policies. Pembaur, 475 U.S. at 483.

Under the Commonwealth Court's decision, municipal liability under §1983 cannot be premised on final policymaking authority unless the authority is delegated by the municipal defendant or its officials. A delegation by the state, according to the Commonwealth Court, will not suffice. Murtagh II therefore conflicts with this Court's decisions in Jett, 491 U.S. at 737, Praprotnik, 485 U.S. at 126-27 and Pembaur, 475 U.S. at 483, which recognize that, for purposes of §1983, state law (from which all municipal authority flows) may delegate "final policymaking authority" for municipalities.

Murtagh II conflicts also with decisions by at least three federal courts of appeals on the ability of states to delegate final policymaking authority for municipalities. E.g., Williams v. Butler, 863 F.2d 1398, 1403 (8th Cir. 1988), cert. denied, 492 U.S. 906 (1989) (a state statute may delegate final policymaking authority for municipalities to municipal judges); Parker v. Williams, 862 F.2d 1471, 1479 (11th Cir. 1989) (under state law, officials may exercise final policymaking authority for different governmental entities); Crane v. Texas, 766 F.2d 193 (5th Cir. 1985), cert. denied, 474 U.S. 1020 (1985) (state law may delegate final

policymaking authority for county functions to state officials).

Contrary to the holdings of Jett, Praprotnik and Pembaur, the Commonwealth Court erroneously focused on how final policymaking authority was delegated instead of whether it was delegated. Praprotnik, 485 U.S. at 126-127. Its decision allows state law to shield municipalities from liability for constitutional violations by delegating authority to act on behalf of one municipality to an official of another governmental entity. This result defeats the purpose underlying this Court's decisions for the law on final policymaking authority in §1983 cases, which is to prevent municipalities from avoiding liability for constitutional violations by dispersing responsibility for municipal functions among numerous officials. Praprotnik, 485 U.S. at 124-27. The Commonwealth Court's failure to grasp this basic principle of municipal liability under §1983 -- and the resulting conflict between it, this Court and the Court of Appeals -- should be reviewed by this Court.

### D. The Court Has Jurisdiction to Hear This Appeal.

Respondents may claim the Court lacks jurisdiction to hear this appeal because of the procedural posture of the case. The County therefore demonstrates below that jurisdiction under 28 U.S.C. §1257 over both issues presented is proper.

The Commonwealth Court's decision to dismiss the Municipal Defendants from this case is a final judgment under §1257. While finality is determined by federal law, Gotthilf v. Sills, 375 U.S. 79 (1963), the Court has treated interlocutory decisions by state courts as final decisions where, as in this case, they have been certified by the state courts for interlocutory appeal. For example, in Citizens & Southern Nat'l Bank v. Bougas, 434 U.S. 35 (1977), the Court granted certiorari to review a judgment by the Georgia Court of Appeals affirming a trial court's denial of a motion to dismiss. Although the trial court's decision was interlocutory, the Court of Appeals certified the decision for interlocutory appeal. Id. at 37. The Court granted certiorari after Georgia's Supreme Court denied discretionary review. 434 U.S. at 37 n. 3.

Like Citizens & Southern Nat'l Bank, the Court has jurisdiction because the trial court's order has been certified for interlocutory appeal. 434 U.S. at 37. The finality of the Commonwealth Court's decision in Murtagh II, however, is more apparent than the order in Citizens & Southern Nat'l Bank. There the Court of Appeals affirmed the denial of a motion to dismiss. By contrast, Murtagh II dismisses the Municipal Defendants from the case by reversing the trial court's denial of their preliminary objections. Thus, Murtagh II, unlike Citizens & Scuthern Nat'l Bank, is considered final under state law. E.g., Alexander v. Mastercraft, 455 Pa. 579, 317 A.2d 278 (1974) (dismissal of claims

against additional defendants on preliminary objections is a final order).

Nor is there any lack of finality because the Pennsylvania Supreme Court did not exercise discretionary review. Instead, because the Pennsylvania Supreme Court refused to exercise discretionary review, the Commonwealth Court's decision is a judgment "rendered by the highest court of a State in which a decision could be had" under §1257. E.g., Cohen v. California, 403 U.S. 15 (1971) (Court has jurisdiction over decision by intermediate state appellate court after state supreme court refuses to exercise discretionary authority to review).

The Court also has jurisdiction to resolve the conflict between the Court and the Pennsylvania Supreme Court over the viability of the Taxpayers' §1983 claims under the Court's "pragmatic approach" to the "final judgment rule." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 486 (1975). In Cox, the Court recognized that "at least four categories" of decisions are considered final under §1257 even though additional proceedings are required in the state courts. Id. at 477. One of these categories, applicable here, involves cases where (a) the federal issue has been decided by the state courts, (b) the federal issue might evade review because the petitioner may prevail on nonfederal grounds, (c) reversal on the federal issue would preclude further litigation, and (d) "a refusal immediately to review the

state-court decision might seriously erode federal policy . . . ." 420 U.S. at 482-83.

In one example, Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963), the Court considered whether federal law dictated venue for an action in state court against two national banks. Id. at 556-57. In holding that a final judgment existed under 28 U.S.C. §1257 even though the Supreme Court of Texas had adjudicated only the question of proper venue, this Court explained:

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. §1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may be all for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Langdeau, 371 U.S. at 558. This principal was noted more recently in Mitchell v. Forsyth, 472 U.S. 511, 525

n.8 (1985) ("state-court decisions rejecting a party's federal law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. §1257.").

This case satisfies the standards for finality set forth in Cox. First, the Pennsylvania Supreme Court has decided incorrectly the federal issue (the viability of the Taxpayers' §1983 claims) in Murtagh I and has refused to reconsider its decision in light of National Private Truck Council.

Second, the federal issue might evade review because the County can prevail on nonfederal grounds. Specifically, the County will prevail if the Taxpayers are unable to establish a lack of uniformity in violation of Pennsylvania law. Cf. Nordlinger v. Hahn, 505 U.S. 1, 14-16 (1992) (construing Webster and concluding that Equal Protection claim turns on whether state law permits alleged discrimination in tax assessments); Nashville C. & St. L.R. Co. v. Browning, 310 U.S. 362, 369 (1940) ("If the state supreme court had construed the requirement of uniformity in the Tennessee Constitution so as to permit recognition of these diversities, no appeal could successfully be made to the Fourteenth Amendment."). Among other things, the Taxpayers likely will be unable to satisfy their heavy burden of proving a lack of uniformity and establishing damages if a lack of uniformity exists. E.g., Calcagni v. Board of Assessments Appeals of Lehigh County, 55 Pa.

Commw. Ct. 39, 423 A.2d 24 (1980) (examining standards for establishing a lack of uniformity).

Third, reversal on the federal issue would preclude further litigation because the Taxpayers have asserted only federal claims under §1983. Therefore, a decision by this Court that the Taxpayers have no §1983 claims terminates the litigation.

Fourth, if the Court refuses to hear this case, the strong federal policies outlined in National Private Truck Council will have been nullified. Cox, 420 U.S. at 482-83. This is because taxpayers -- in this case and others pending in Pennsylvania -- will rely on Murtagh I to challenge the constitutionality of local taxes under §1983 even though this Court rejected such a claim in National Private Truck Council.

Finally, the issue here is more compelling than the issue presented in Langdeau. There the federal issue went solely to venue. By contrast, the issue in this case is whether the Taxpayers have any valid claim under §1983. As in Langdeau, this issue is separate and independent from the merits of the Taxpayers' claim and its resolution may avoid long and complex class action litigation that will be expensive and disruptive for the County. As in Langdeau, the policies underlying §1257 require prompt consideration of this preliminary federal issue. Accordingly, jurisdiction is proper.

## IX. CONCLUSION

For the reasons set forth above, the County of Berks and the Berks County Board of Assessment Appeals respectfully submit that the decisions below by Pennsylvania's appellate courts are in conflict with this Court on important federal issues requiring review by this Court. The County of Berks and the

Berks County Board of Assessment Appeals respectfully request the Court to grant their petition for writ of certiorari.

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EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| GREENWICH TOWNSHIP, et al., Appellants | : | |
| v. | : | No. 625 C.D. 1991 |
| MERRY J. MURTAGH, et al., Appellees | : | |
| BOROUGH OF WYOMISSING HILLS, BOROUGH OF BIRDSBORO, BOROUGH OF WEST READING, et al., Appellants | : | |
| v. | : | No. 771 C.D. 1991 |
| MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH, et al., Appellees | : | Argued: September 11, 1991 |

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge

HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge

OPINION BY JUDGE PELLEGRINI

Filed January 9, 1992

Greenwich Township, et al. and Borough of Wyomissing Hills, et al. (Local Governments) appeal an order of the Court of Common Pleas of Berks County, finding that the trial court has subject matter jurisdiction to a class action Section 1983 amended complaint of Merry J. Murtagh, et al. (Taxpayers), challenging the constitutionality of the manner in which property is assessed for real estate tax purposes.

Taxpayers, representing a class of recent purchasers of real property in Berks County, filed a complaint against the County of Berks (County) and the Berks County Board of Assessment Appeals (Board), alleging that they had adopted a so-called "Welcome Stranger" policy. Taxpayers alleged that under that policy, recently purchased properties were re-assessed at fair market value, resulting in significantly higher tax assessments than those on other comparable longer-held neighboring properties which were not re-assessed under

the practice. Taxpayers alleged that the County and the Board's practice violated their equal protection rights under the Fourteenth Amendment,[1] and, because the re-assessments were done under color of state law, there was a violation of 42 U.S.C. §1983.

The County and the Board filed a number of preliminary objections to Taxpayers' complaint, only one of which the trial court sustained finding that Taxpayers had failed to sue the local governments who levied taxes which were indispensable parties. As a result, Taxpayers filed an amended complaint joining all taxing authorities in the County, nearly 100 cities, boroughs, townships and school districts. Many of the newly joined local government defendants again filed preliminary objections to the amended complaint based upon lack of subject matter jurisdiction. The trial court dismissed both sets of preliminary objections, but certified the issue for appeal pursuant to Pa. R.A.P.

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[1] Taxpayers rely principally on Allegheny Pittsburgh Coal Company v. County Commissioner of Webster County, 488 U.S. 336 (1989), where the Supreme Court overturned a West Virginia Supreme Court decision, and held that this type of "Welcome Stranger" policy violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

§1311(b).[2] Subsequently, this court granted separate petitions for permission to appeal an interlocutory order filed by Local Governments and consolidated the appeals.

Local Governments contend, as they did before the trial court, that municipalities and school districts are not proper parties to the action, because they do not have the power or authority to set policy concerning property assessments. Moreover, they now contend that the trial court does not have subject matter jurisdiction over a Section 1983 action challenging a county's tax assessment procedure because a Section 1983 action challenging a state tax scheme and seeking monetary damages is not maintainable in a state court where taxpayers have a plain, adequate and complete state remedy. Pointing out that an identical Section 1983 action challenging the County's "Welcome Strangers" policy was dismissed by a federal district court in Sunderland Properties, Inc. v. County of Berks, 750 F.

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[2] Under Pa. R.A.P. 1311(b), a party may file a petition for permission to appeal to this Court when the trial court's interlocutory order contains the statement prescribed in 42 Pa. C.S. §702(b). The trial court's Order satisfied this requirement by stating that "[t]his Order is deemed to involve a controlling question of law as to which there is a substantial ground for difference of opinion. An immediate appeal from the Order may materially advance the ultimate determination of this matter."

Supp. 704 (E.D. Pa. 1990) based upon comity and the Tax Injunction Act of 1937, 28 U.S.C. §1341,[3] Local Governments argue that similarly, a state court should not entertain a Section 1983 action, enabling Taxpayers to circumvent the statutory scheme set forth in the General County Assessment Law (GCAL)[4] and the Third Class County Assessment Law (TCCAL).[5]

Taxpayers do not disagree that federal courts have routinely refrained from interfering with the administration of state taxes, including the district court in Sunderland Properties, under the principles set forth in

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[3] The Tax Injunction Act of 1937 provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. §1341. (Emphasis added.)

[4] Act of May 22, 1933, P.L. 853, as amended, 72 P.S. §§5020-101-5020-602.

[5] Act of June 26, 1931, P.L. 1379, as amended, 72 P.S. §§5342-5350j.2. This act does not have an official name but is commonly referred to as the Third Class County Assessment Law.

Fair Assessment In Real Estate v. McNardy, 454 U.S. 100 (1981). In Fair Assessment, the Supreme Court found that while the Tax Injunction Act only bars injunctive action, the principle of comity[6] bars actions

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[6] The Supreme Court in Fair Assessment cited their decision in Younger v. Harris, 401 U.S. 37, 44-45 (1985), where they explained:

> [That] the notion of 'comity,'. . .is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways. . .[T]he concept [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,'

for monetary damages as well. Id. at 180. By enacting the Tax Injunction Act, the Supreme Court stated that Congress recognized that the autonomy and fiscal stability of states survive best when their tax systems are not subject to scrutiny in federal courts. Id. at 102-103. The court reasoned that allowing actions for monetary damages would be just as intrusive and disruptive to the states' revenue collection system as the actions for injunctive relief specifically barred under the Tax Injunction Act. Id. at 114-115. It then went on to state that "[s]uch taxpayers must seek protection of their federal rights by state remedies, provided, of course, that those remedies are plain, adequate, and complete [footnote omitted][7] and may ultimately seek review of

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> born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Fair Assessment, 454 U.S. at 112.

[7] The omitted footnote stated that the court discerned no significant difference between remedies which are "plain, adequate, and complete," as the phrase is used to articulate the doctrine of equitable constraint under comity, and those that are "plain, speedy and efficient," within the meaning of the Tax Injunction Act. Fair Assessment, 454 U.S. at 116 n.8.

the state decisions in this court." Id. at 116.[8] (Emphasis added.)

Taxpayers counter, however, that the defense of comity and the prohibitions contained in the Tax Injunction Act are not defenses that are applicable in state courts. Because comity is a doctrine based upon "the need for federal court restraint", "the fundamental principle of comity between federal courts and state courts" and the "respect that should be accorded state tax laws", as well as the "question of state law . . . like other state regulatory issues are heard in state court," Id. at 103, 108, 109, none of those concerns expressed in Fair Assessment and its progeny are applicable when a cause of action is brought in the state forum. They contend that state courts present no danger of federal court interference or misunderstanding, and the abstention based upon comity simply then is inapplicable. Moreover, Taxpayers contend that the Tax Injunction Act only applies by its very terms to preclude federal courts, not state courts, from enjoining state tax schemes.

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[8] Justice Brennan, speaking for three other concurring justices, would have found that the taxpayer must exhaust the available administrative remedies prior to bringing a Section 1983 suit, stating that "the requirement of exhaustion of state administrative remedies was certainly a mandatory precondition to suit and, in a sense, a 'jurisdictional pre-requisite.'" Fair Assessment, 454 U.S. at 137.

Since Maine v. Thiboutot, 448 U.S. 1 (1980), it has been settled that state courts have concurrent jurisdiction with federal courts to hear Section 1983 claims. Uncertainty, however, existed as to whether state courts were required to hear such claims or whether they could decline to do so when they perceived that to allow such a suit would be contrary to state law or interest. Overturning a Florida Court of Appeal's decision declining to exercise section 1983 jurisdiction, the Supreme Court in Howlett v. Rose, 110 S.Ct. 2430 (1990), in holding that there was no discretion by a state court to entertain such claims, the reverse of comity, discussed the method and enforcement of federal law in state courts.

The Court in Howlett explained that the "federal law is enforceable in state courts.....because the Constitution and laws passed pursuant to it are as much laws in the states as laws passed by the state legislature." Id. at 2438. Expressing that state courts may not, except in rare circumstances, deny a federal right when the parties and controversy are properly before the state court, the Supreme Court found that the overriding federal interest requires that, "A state may not, by statute or common law, create a cause of action under Section 1983 . . . ", nor may a state lessen the availability of a Section 1983 action. Id. at 2439, 2442. The Supreme Court held that in actions brought in state courts seeking to enforce federal law, "the rights of, and the defenses to, a federal cause of action are defined by federal law." Id. at 2442.

The Supreme Court foreclosed the state courts from expanding or limiting the availability of a federal cause of action because Section 1983 advances federal, and not state rights and interests. By doing so, the Supreme Court, in effect, enunciated a principle that while state courts are required to entertain federal causes of actions, they should be guided by federal law to determine how federal rights are to be enforced,[9] thereby attempting to assure that the outcome of federal causes of actions would be the same, regardless if decided in a state or federal forum.

Other states have used this principle to determine whether a Section 1983 challenge to state administration of taxes can be maintained in state courts. In Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370 (1976), the Georgia Supreme Court held that a Section 1983 claim is not available under the principles set forth

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[9] Quoting from Wilson v. Garcia, 471 U.S. 261, 269 (1985), the Supreme Court in Howlett stated:

> Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.

Howlett, 110 S.Ct. at 2444.

under the Tax Injunction Act, stating that "[t]he overriding interests of the state in an efficient, expeditious and non-disruptive resolution of ad valorem [property] tax disputes would be severely impaired, if not destroyed, by allowance of such suits." Id. at ____, 224 S.E.2d at 374. Echoing this reasoning, and applying Fair Assessment, the Supreme Court of Missouri, in Stufflebaum v. Pantethiere, 691 S.W.2d 271, 272 (Mo. en banc 1985), stated that "if Section 1983 could be invoked [in real estate tax cases], 'the obstruction to the collection of taxes would be so frequent as to be intolerable.'" (Citation omitted.)

Noting the absence of any language in Fair Assessment, indicating that state courts are required to entertain Section 1983 challenges to state taxation, the Supreme Court of North Dakota in Linderkamp v. Bismark School District No. 1, 397 N.W.2d 76, 79-80 (N.D. 1986), found that the Tax Injunction Act recognizes "that state taxation embraces uniquely local concerns, and that the greatest possible deference (should) be paid to state remedial schemes." Id. at 79. It then went on to state that "deference to state remedial schemes leads to the conclusion that a state court §1983 action . . . is no less of a burden upon the state remedial scheme than would be a Section 1983 action in federal court." Id. See also Spencer v. South Carolina Tax Commission, 281 S.C. 492, 316 S.E.2d 386 (1984), aff'd mem., 471 U.S. 82 (1985); Johnson v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381, appeal denied, 313 N.C. 508, 329 S.E.2d 392 (1985); Zizka v.

Water Pollution Control Authority, 195 Conn. 682, 490 A.2d 509 (1985); Davis v. City of Eckhorn, 132 Wisc. 2d 394, 393 N.W.2d 95 (1986); Nutbrown v. Munn, 311 Or. 328, 811 P.2d 131 (1990); Hogan v. Musolf, 471 N.W.2d 216 (Wisc. 1991); L.L. Bean, Inc. v. Bracey, ___ S.W.2d ___, 1991 WL 195305 (Tenn. No. 01501-9010-CH-00087, filed September 9, 1991).[10]

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[10] Only two state courts have decided that a Section 1983 action can be maintained without requiring an exhaustion of state remedies. The Supreme Court of Mississippi in Burrell v. Mississippi State Tax Commission, 536 So.2d 848, 864 (Miss. 1988), held that their state courts must hear taxpayers' actions brought pursuant to Section 1983, because they have concurrent jurisdiction with the federal courts, and the Supremacy Clause of the United States Constitution requires that state courts enforce the valid enactments of Congress, of which Section 1983 is one. However, the court never considered the exhaustion of remedies argument advanced by the concurrence in Fair Assessment, but simply looked at the principle of comity espoused by the majority, finding that it did not apply to state courts. Id.

The Superior Court of New Jersey in Bung's Bar & Grille, Inc. v. Florence Township, 206 N.J. Super. 432, ____, 502 A.2d 1198, 1215-1216 (1985), held that their courts must entertain these actions, since New Jersey law demands that all issues of a

We join the consensus of other state courts that a Section 1983 challenge to state tax administration is not maintainable if state remedies afford the taxpayer an opportunity for full and adequate relief. Both Congress, by enacting the Anti-Tax Injunction Act, and the Supreme Court, by its holding in Fair Assessment, prohibiting or declining to exercise jurisdiction, have decided that federal interests are not advanced by allowing federal causes of action to intrude upon a carefully formulated state system designed to rectify state tax disputes. Since federal courts decline to exercise jurisdiction because federal intrusion in state tax schemes is unwarranted, state courts should also not interfere, because its enforcement of Section 1983 is no less intrusive or disruptive than if enforced by a federal court.[11]

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controversy be included at the same time in a lawsuit and the available administrative remedy did not allow for civil rights claims. However, this decision is not at odds with those of the majority of other states, since the decision actually turned on the fact that this joinder requirement deprived plaintiffs of a "plain, speedy and efficient remedy." Id. at ____, 502 A.2d at 1215.

11 Taxpayers also rely on the recent U.S. Supreme Court opinion in Dennis v. Higgins, 59 U.S.L.W. 4117 (1991). Dennis held that a taxpayer's claim brought in a Nebraska state court that a state tax discriminates against non-residents in violation of

Because a Pennsylvania court has not addressed this issue, we must now determine whether the established administrative remedy provides Taxpayers with a "plain, adequate, and complete" remedy. The existing administrative procedures applicable to a taxpayer's appeal of a property assessment in Berks County can be found in the General County Assessment Law and the Third Class County Assessment Law.

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the Commerce Clause is actionable under Section 1983. Taxpayers point to the language in the dissenting opinion which states: "[t]oday's decision raises far more questions about the proper conduct of challenges to the validity of state taxation than it answers." Id. at 4124. (Kennedy, J. dissenting.) The dissenting opinion, alluding to the Tax Injunction Act, and the court's opinion in Fair Assessment and the state supreme court cases of Backus and Spencer, stated that the questions regarding jurisdiction of the state courts over tax actions "now become of paramount importance, as we risk the destruction of state fiscal integrity in a manner which may require congressional correction." Id. Because the majority in Dennis never discusses whether the state court had subject matter jurisdiction or whether there was a full and complete remedy at state law, apparently because those issues were not raised and because of the unique procedural history of that case, it has no impact on our decision.

The Third Class County Assessment Law creates a three member Board of Assessment Appeals (Board) in each county which must cause annual assessment of property within its jurisdiction. Sections 1 and 3 of the TCCAL; 72 P.S. §§5342, 5344. Property owners subject to these assessments must be duly notified. Section 8(b) of the TCCAL; 72 P.S. §5349(b). A property owner who is aggrieved by any assessment, whether or not the assessment has been changed from the previous year, has a right to appeal to the Board for relief. Section 8(c) of the TCCAL; 72 P.S. §5349(c). When such an appeal has been filed, the Board must notify each person and each taxing district which has an interest and has the power to compel the attendance of witnesses and the furnishing of documents. Section 8(d) of the TCCAL; 72 P.S. §5349(d).

Section 9 of the Third Class County Assessment Law further provides that the aggrieved property owner may appeal the final decision of the Board to the county court of common pleas. 72 P.S. §5350. The court of common pleas will proceed de novo. Appeal of U.S Steel Corporation, 436 Pa. 435, 260 A.2d 779 (1970); Valley Forge Golf Club, Inc. v. Board of Assessment and Revision of Taxes of Montgomery County, 3 Pa. Commonwealth Ct. 644, 285 A.2d 213 (1971).

The General County Assessment Law also applies to Berks County, where it is not inconsistent with the Third Class County Assessment Act. Art. I, §105 of

the GCAL; 72 P.S. §5020-105; Truck Terminal Motels of America, Inc. v. Berks County Board of Assessment Appeals, 127 Pa. Commonwealth Ct. 408, 561 A.2d 1305 (1989) petition allowance of appeal denied, 525 Pa. 625, 581 A.2d 576 (1990). The General County Assessment Law provides that the Board in each county shall hear property owners' appeals of tax assessments. Art. V, §511 of the GCAL; 72 P.S. §5020-511. The decision of the Board can then be appealed to a court of common pleas for a de novo proceeding, with further appeals to the Superior and Supreme Courts. Art. V, §§518.1, 518.2, and 519 of the GCAL; 72 P.S. §§5020-518.1-2, 5020-519.

The federal courts in Pennsylvania have already addressed the issue of whether the General and Third Class County Assessment Laws provide a taxpayer a plain, adequate, and complete remedy.[12] In Garrett v. Bamford, 582 F.2d 810 (3rd Cir. 1978), the United States Court of Appeals for the Third Circuit held that the district court properly abstained from entertaining a Section 1983 class action challenging alleged

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[12] The Pennsylvania courts are not bound by the decisions of the federal courts, except those of the United States Supreme Court. See Department of Environmental Resources v. City of Harrisburg, 133 Pa. Commonwealth Ct. 577, 578 A.2d 563 (1990); Cianfrani v. Johns-Manville Corp., 334 Pa. Superior Ct. 1, 482 A.2d 1049 (1984).

discriminatory property tax assessments brought by property owners in Berks County. The Third Circuit held that the class action was precluded in federal court under the Tax Injunction Act, since the Third Class County Assessment Law, affording administrative appeal with judicial review to a class, provided them with a plain, speedy and efficient remedy. Id. at 819.

The Third Circuit in Garrett went on to state that the property owner's allegation that the assessments were not uniform and violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution could be asserted under Article VIII, §1 of the Pennsylvania Constitution[13] and addressed by the Board and by the court of common pleas at the de novo proceeding. The court, citing Buhl Foundation v. Board of Property Assessment, 407 Pa. 567, 570, 180 A.2d 900, 902 (1962), stated that it is the Board's and the Court of Common Pleas' duty to

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[13] This Article of the Pennsylvania Constitution provides that:

> All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

Pa. Const. art. VII, §1.

determine the value of the property, and between the standard of actual value and the standard of uniformity, uniformity must prevail. Garrett, 582 F.2d at 816. Therefore, the court reasoned, an action pursuant to Section 1983 would not afford the taxpayer any more relief than he would receive under Pennsylvania law. Id. at 817.

Moreover, as previously mentioned in a recent case involving the exact same allegations concerning the so-called "Welcome Stranger" policy in Berks County, the United States District Court for the Eastern District of Pennsylvania ruled that the principle of comity relied on by the majority in Fair Assessment barred the taxpayer's action in federal court. Sunderland Properties, Inc. v. County of Berks, 750 F.Supp. 704, 710. The court in Sunderland further stated that the principle of comity would bar the action only if the plaintiff was provided a "plain, adequate and complete" remedy under state law. Id. at 707.

In determining whether the plaintiff's remedy was plain, adequate and complete, the Sunderland court stated that:

> A plaintiff's state remedy is plain, speedy and efficient if it provides the taxpayer with a full hearing and Judicial determination at which the taxpayer may raise federal constitutional objections. Rosewell

> v. LaSalle National Bank, 450 U.S. 503, 514 (1981). . . .The state remedy that will suffice need only be adequate, and need not be coextensive with the remedies in federal court. In other words, the state remedy that will meet the requirement of plain, speedy and efficient need not be the best or most convenient one.

Id. at 707. (Citations omitted.) (Emphasis added.)

The District Court found the remedy to be plain, adequate and complete, since the General County Assessment Law, specifically 42 P.S. §5020-518.1, gave the court of common pleas broad powers to grant appropriate relief, which would include the consideration of constitutional issues. Id. at 708-710. The court found nothing in the procedures provided under the General and Third Class County Assessment Laws which would prevent plaintiffs from raising their constitutional issues. Id. at 708.

The consideration of constitutional issues by the Board and the Court of Common Pleas in tax assessment cases is also well recognized by the Pennsylvania courts. See Borough of Greentree v. Board of Property Assessments, 459 Pa. 262, 328 A.2d 819 (1974); McKnight Shopping Center, Inc. v. Board of Property Assessment, 417 Pa. 234, 209 A.2d 389

(1965); Consolidated Gas Supply Corporation v. County of Clinton, 80 Pa. Commonwealth Ct. 10, 470 A.2d 1113 (1984); Concerned Taxpayers of Beaver County v. Beaver County Board of Assessment Appeals, 75 Pa. Commonwealth Ct. 443, 462 A.2d 347 (1983).

Since Taxpayers may raise their constitutional contentions through an exhaustion of the existing administrative procedures, we also hold that the General and Third Class County Assessment Laws provide Taxpayers with a plain, adequate and complete remedy. The statutory procedures provide a full hearing before the Board, followed by a de novo judicial determination of the Board's decision by the court of common pleas. Taxpayers may properly raise their constitutional issues before the Board and before the trial court on appeal. Taxpayers present action circumvents the established administrative procedures for reviewing a tax assessment and should be dismissed.[14]

Accordingly, we will reverse the order of the trial court and remand with instructions to dismiss the entire action for lack of subject matter jurisdiction.

DAN PELLEGRINI, JUDGE

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[14] Due to our resolution of this case on this issue, we need not address Local Governments' contentions contained in their appeal at 625 C.D. 1991.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| GREENWICH TOWNSHIP, et al., Appellants | : | |
| v. | : | No. 625 C.D. 1991 |
| MERRY J. MURTAGH, et al., Appellees | : | |
| BOROUGH OF WYOMISSING HILLS, BOROUGH OF BIRDSBORO, BOROUGH OF WEST READING, et al., Appellants | : | |
| v. | : | No. 771 C.D. 1991 |
| MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH, et al., Appellees | : | |

ORDER

AND NOW, this 9th day of January, 1992, the order of the Berks County Court of Common

Pleas dated January 23, 1991, is reversed and remanded with instructions to dismiss the entire action for lack of subject matter jurisdiction.

Jurisdiction relinquished.

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
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| GREENWICH TOWNSHIP, et al., Appellants | : | |
| v. | : | No. 625 C.D. 1991 |
| MERRY J. MURTAGH, et al., Appellees | : | |
| BOROUGH OF WYOMISSING HILLS, BOROUGH OF BIRDSBORO, BOROUGH OF WEST READING, et al., Appellants | : | |
| v. | : | No. 771 C.D. 1991 |
| MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH, et al., Appellees | : | Argued: September 11, 1991 |

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge

HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge

OPINION BY JUDGE PELLEGRINI

Filed January 9, 1992

I disagree that the taxpayers present action should be dismissed for failure to exhaust administrative procedures. Since taxpayers claim Section 1983 violations as a result of the County and Board's practice, they need not exhaust administrative remedies to pursue their claims. See Felder v. Casey, 487 U.S. 131 (1988) (exhaustion of administrative remedy not required where Section 1983 claim brought in state, as well as federal, forum). Also, see Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), and this Court's holding in City of Lancaster v. County of Lancaster, ____ Pa. Commonwealth Ct. ____ A.2d ____ (No. 2171 C.D. 1990, filed November 15, 1991). Thus, the Court of Common Pleas of Berks County properly determined that it had subject matter jurisdiction in this case.

DORIS A. SMITH, JUDGE

EXHIBIT B

[J-55-93]

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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| MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH, et al., Appellants | : | No. 34 M.D. Appeal Docket 1992 |
| | : | Appeal from the Order of the Commonwealth Court dated January 9, 1992, Nos. 625 C.D. 1991 and 771 C.D. 1991, reversing the Amended Order of the Court of Common Pleas of Berks County dated March 7, 1991, at No. 5182-89 AD |
| v. | : | |
| COUNTY OF BERKS, et al., Appellees | : | |
| | : | 144 Pa. Cmwlth. 624, 601 A.2d 1352 (1992) |
| | : | ARGUED: March 8, 1993 |

OPINION OF THE COURT

MR. JUSTICE FLAHERTY

DECIDED: NOVEMBER 10, 1993

Merry J. Murtagh and other taxpayers appeal an order of Commonwealth Court reversing an

order of the Court of Common Pleas of Berks County and remanding with instructions to dismiss the action for lack of subject matter jurisdiction. The trial court had concluded that it had subject matter jurisdiction over a class action brought by the taxpayers against the County of Berks and other local government units under 42 U.S.C. § 1983[1] challenging the constitutionality of the manner in which property is assessed for real estate tax purposes.

The taxpayers, representing a class of recent purchasers of real estate in Berks County, filed an amended complaint, after exhausting state administrative

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[1] 42 U.S.C. §1983 (1988) creates a remedy for violations of federal rights committed by persons acting under color of state law. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

remedies, against the local governments.[2] They asserted that the local governments had adopted a discriminatory "Welcome Stranger" policy. This policy results in the reassessment of recently purchased realty based on the purchase price while making no modifications in the assessment of comparable property not recently sold.[3]

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2 The taxpayers originally sued the County of Berks, the Berks County Board for the Assessment and Revision of Taxes and the Berks County Board of Assessment Appeals. The county and the board filed a number of preliminary objections to taxpayers' complaint. The trial court sustained only one of the objections finding that taxpayers had failed to sue the taxing authorities which were indispensable parties. As a result, taxpayers filed an amended complaint joining all taxing authorities in the county, nearly 100 cities, boroughs, townships, and school districts, herein referred to as the local governments.

3 The Constitution and statutes of the Commonwealth embody a system of taxation that requires property to be taxed at a uniform rate according to its estimated actual market value. See Pa. Const. art. VIII, §1; 72 Pa.C.S. §5020-101 et seq. and §5342 et seq.

The Commonwealth Court recently invalidated a county tax assessment scheme where it found that the county violated the uniformity requirement of

The taxpayers alleged that this practice violated their equal protection rights under the Fourteenth Amendment and, because the reassessments were done under color of state law, constituted a violation of 42 U.S.C. § 1983.[4]

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the state Constitution and equalization requirement of the statute governing assessments by third-class counties. See City of Lancaster v. County of Lancaster, 143 Pa. Cmwlth. 476, 599 A.2d 289 (1991).

[4] The substance of the taxpayers' complaint is that the "Welcome Stranger" policy of Berks County causes de facto discrimination and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Taxpayers cite, as authority for their claim, Allegheny Pittsburgh Coal Co. v. County Commissioner of Webster County, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). There, the Supreme Court held that the de facto discrimination engendered by a "Welcome Stranger" policy in a "current value" taxation system violated said Equal Protection Clause. See also Nordlinger v. Hahn, ____ U.S. ____, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992).

Given the procedural posture of this case, it is inappropriate to comment on the merits of the taxpayers' case.

The local government defendants filed preliminary objections to the amended complaint based on, among other things, a lack of subject matter jurisdiction. The trial court dismissed both sets of preliminary objections, and certified the issue for appeal pursuant to Pa. R.A.P. 1311(b). Commonwealth Court granted separate petitions for permission to appeal the order, consolidated the appeals, and reversed.

The question presented is whether state courts must entertain section 1983 class actions challenging the constitutionality of a county's tax assessment procedure where plaintiffs have not exhausted state administrative and judicial remedies. The local governments contend that the trial court does not have subject matter jurisdiction over such a section 1983 action, arguing that state courts should follow the direction of the federal courts and refrain from entertaining such suits where there are plain, adequate and complete state administrative and judicial remedies.[5]

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[5] The local governments further argue that some state courts have refrained from entertaining such suits. See, e.g., Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370 (1976). Since these cases pre-date important Supreme Court cases discussed infra, we do not find them probative of the issue presented.

Courts that do require their courts to hear section 1983 actions before exhaustion of state statutory

Federal courts have routinely refrained from interfering with the administration of state taxes due to the Tax Injunction Act, 28 U.S.C. § 1341, and

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remedies include Mississippi and New Jersey. Burrell v. Mississippi State Tax Commission, 536 So.2d 848 (Miss. 1988) and Bung's Bar & Grille, Inc. v. Florence Township, 206 N.J. Super. 432, 502 A.2d 1198 (1985). In Burrell, the court held that state courts must hear taxpayers' actions brought pursuant to Section 1983, because they have concurrent jurisdiction with the federal courts, because the Supremacy Clause of the United States Constitution requires that state courts enforce the valid enactments of Congress, of which section 1983 is one, and because the principle of comity did not apply to state courts. In Bung's Bar, the Superior Court held that the state courts must entertain section 1983 actions, since New Jersey law demands that all issues of a controversy be included at the same time in a lawsuit and the available administrative remedy did not allow for civil rights claims. Neither court addressed the exhaustion of remedies argument.

See also Nutbrown v. Munn, 311 Ore. 328, 811 P.2d 131 (1990); Hogan v. Musolf, 471 N.W.2d 216 (Wisc. 1991),l and L.LO. Bean, Inc. v. Bracey, 817 S.W.2d 292 (Tenn. 1991). In these cases, section 1983 actions were entertained by state courts.

principles of comity. In Fair Assessment In Real Estate v. McNary, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981), the Supreme Court of the United States ruled that actions for injunctive relief and monetary damages from a state property assessment procedure are barred in the federal courts by the principle of comity. That court said that comity concerns motivated congress to pass the Tax Injunction Act which prohibits a district court from enjoining, suspending or restraining the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.[6] 454 U.S. at 103, 102 S.Ct. at 179, 70 L.Ed.2d at 275. By enacting that statute, congress recognized that the autonomy and fiscal stability of states survive best when their tax systems are not subject to scrutiny in federal courts. 454 U.S. at 102-03, 102 S.Ct. at 179, 70 L.Ed.2d at 275. The Supreme Court of the United States also ruled that a similar action for monetary damages is likewise barred as long as the state provides for plain, adequate and complete remedies,

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[6] The Tax Injunction Act of 1937, 28 U.S.C. §1341, provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

because such actions are just as intrusive to the states' revenue collection systems as the actions for injunctive relief specifically barred under the Tax Injunction Act. 454 U.S. at 114-15, 102 S.Ct. at 185, 70 L.Ed.2d at 282. The court then stated that such taxpayers are to seek protection of their federal rights by state remedies provided that those remedies are plain, adequate, and complete and may ultimately seek review of the state decisions in the Supreme Court of the United States. 454 U.S. at 116, 102 S.Ct. at 186, 70 L.Ed.2d at 283.[7]

State courts are not bound by Fair Assessment and its progeny. The Tax-Injunction Act applies by its very terms to preclude federal courts, not state courts, from enjoining state tax schemes. Therefore, there is no danger of federal court interference or misunderstanding. Likewise, abstention based on comity has no application when a section 1983

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[7] The Court discerned no significant difference between remedies which are "plain, adequate, and complete" as the phrase is used to articulate the doctrine of equitable constraint under comity, and those that are "plain, speedy and efficient," within the meaning of the Tax Injunction Act. Fair Assessment, 454 U.S. at 116 n.8, 102 S.Ct. at 186 n.8, 70 L.Ed.2d at 283 n.8.

cause of action is brought in state courts because there is no risk of federal court interference.[8]

The local governments nonetheless argue that the state courts should abstain from hearing section 1983 claims until the taxpayers have exhausted state administrative and judicial remedies. They appear to argue that section 1983 plaintiffs in state court should be no better off than section 1983 plaintiffs in federal court. Therefore, they should be required to exhaust the administrative and judicial remedies set forth in the Third Class County Assessment Law (TCCAL)[9] and in the

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[8] On the other hand, the federal courts have followed Fair Assessment in cases similar to the Taxpayers' case. e.g., Sunderland Properties, Inc. v. County of Berks, 750 F. Supp. 704 (E.D. Pa. 1990). There, a challenge to the county's "Welcome Strangers" policy was dismissed by the court based upon comity and the Tax Injunction Act of 1937, 28 U.S.C. §1341.

[9] Act of June 26, 1931, P.L. 1379, as amended, 72 P.S. §§5342-5350. This act does not have an official name but is commonly referred to as the Third Class County Assessment Law.

The Third Class County Assessment Law creates a three-member board of assessment appeals (board) in each county. Aggrieved taxpayers appeal to the board and then to the county common pleas court.

General County Assessment Law (GCAL).[10] Under

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The board must cause annual assessment of property within its jurisdiction. Section 1 and 3 of the TCCAL; 72 P.S. §§5342, 5344. Property owners subject to these assessments must be duly notified. Section 8(b) of the TCCAL; 72 P.C. §5349(b). A property owner who is aggrieved by any assessment, whether or not the assessment has been changed from the previous year, has a right to appeal to the board for relief. Section 8(c) of the TCCAL; 72 P.S. §5349(c). When such an appeal has been filed, the board must notify each person and each taxing district which has an interest and has the power to compel the attendance of witnesses and the furnishing of documents. Section 8(d) of the TCCAL; 72 P.S. §5349(d).

Section 9 of the Third Class County Assessment Law further provides that the aggrieved property owner may appeal the final decision of the board to the county court of common pleas. 72 P.S. §5350. The court of common pleas will proceed de novo. Appeal of U.S. Steel Corp., 436 Pa. 435, 260 A.2d 779 (1970).

10 Act of May 22, 1933, P.L. 853 as amended, 72 P.S. §§5020-601, 5020-602.

The General County Assessment Law applies to Berks County, where it is not inconsistent with the

both schemes, a property owner who is aggrieved by any property tax assessment has a right to appeal to a board of assessment appeals, and then to the court of common pleas which is to proceed de novo. In light of the resolution of this case, we need not and do not decide here whether the state statutory remedies are plain, adequate and complete in the context of a section 1983 class action.[11]

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Third Class County Assessment Act. Art. I, §105 of the GCAL; 72 P.S. §5020-105. Truck Terminal Motels of America, Inc. v. Berks County Board of Assessment Appeals, 127 Pa. Cmwlth. 408, 561 A.2d 1305 (1989), petition for allowance of appeal denied, 525 Pa. 652, 581 A.2d 576 (1990). It has a procedural remedy similar to that of the Third Class County Assessment Act. The General County Assessment Law provides that the board in each county shall hear property owners' appeals of tax assessments. Art. V, §511 of the GCAL; 72 P.S. §5020-511. The decision of the board can then be appealed to a court of common pleas for a de novo proceeding, with further appeals to the Superior and Supreme Courts. Art. V, 518.1, 518.2, and 519 of the GCAL; 72 P.S. §§5020-518.1-2, 5020-519.

[11] Taxpayers contend that the state remedies are not plain, adequate and complete because they are precluded from seeking an award of attorneys' fees via the fee shifting policy embodied in §§1983 and 1988. We need not address this issue in light of the

The Supreme Court of the United States has consistently affirmed the duty of state courts to entertain section 1983 actions, except where a valid excuse exists, regardless of whether plaintiffs have exhausted state administrative and judicial remedies. Municipalities may be sued under section 1983 when a

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resolution of this case.

It is noted that the federal courts in Pennsylvania have consistently ruled that both of these laws provide a taxpayer a plain, adequate, and complete remedy. See e.g., Garrett v. Bamford, 582 F.2d 810 (3d Cir. 1978). The Garrett court held that the district court properly abstained from entertaining a section 1983 class action challenging alleged discriminatory property tax assessments brought by property owners in Berks County. The court held that the class action was precluded in federal court under the Tax Injunction Act, since the Third Class County Assessment Law, affording administrative appeal with judicial review to a class, provided them with a plain, speedy and efficient remedy. Id. at 819.

Garrett predated significant Supreme Court rulings in section 1983 litigation and did not address the attorneys' fees issue. Therefore, it would have little probative value to this case were we to address the issue of whether the state remedies are plain, adequate and complete.

municipal policy, ordinance, regulation or custom inflicts constitutional injury. Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Since 1980, the Supreme Court of the United States has made clear that state courts have concurrent jurisdiction with federal courts to hear section 1983 claims. Maine v. Thibout, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). When state courts entertain federal causes of action, the rights of, and the defenses to, a federal cause of action are defined by federal law so that the outcome of federal causes of action would be the same, regardless if decided in a state or federal forum. Howlett v. Rose, 496 U.S. 356, 375, 110 S.Ct. 2430, 2442, 110 L.Ed.2d 332, 353 (1990).[12] Also, in the absence of a valid excuse, state courts have no discretion to decline to accept jurisdiction when the parties and controversy are properly before the state

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[12] The Court in Howlett reaffirmed that federal law is enforceable in state courts because the Constitution and laws passed pursuant to it are as much laws in the states as laws passed by the state legislature. 496 U.S. at 367, 110 S.Ct. at 2438, 110 L.Ed.2d at 347. The Court held that a state-law sovereign immunity defense is not available to a school board in a section 1983 action brought in a state court that otherwise has jurisdiction when such a defense would not be available if the action were brought in a federal forum. 496 U.S. at 361-83, 110 S.Ct. at 2434-47, 110 L.Ed.2d at 343-58.

court. 496 U.S. at 369, 110 S.Ct. at 2439, 110 L.Ed.2d at 348.

A valid excuse may exist when a state court refuses jurisdiction because it has no competent court to hear the case or because of a neutral state rule of judicial administration, unless that rule is preempted by federal law. Felder v. Casey, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988). The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the state create a court competent to hear the case in which the federal claim is presented. Howlett, 496 U.S., 372, 110 S.Ct. at 2441, 110 L.Ed.2d at 350-351. Neutral rules of judicial administration have included those authorizing dismissal of both federal and state claims where neither the plaintiff nor the defendant was a resident of the forum state, Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed.2d 747 (1929), where the cause of action arose outside of the court's territorial jurisdiction, Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945), or where the doctrine of forum non conveniens appropriately applied. Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed.2d 3 (1950).

Neutral state rules of judicial administration appear to be preempted in section 1983 cases, however, in situations where the plaintiff and defendant are residents of the forum state and the cause

of action arises in the forum state. The Supreme Court of the United States has ruled that section 1983 plaintiffs are not required to exhaust state administrative remedies before instituting section 1983 suits in federal courts or state courts. See Patsy v. Board of Regents of Florida, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) and Felder v. Casey, supra, respectively. In Felder, nine months after being allegedly beaten by Milwaukee police officers who arrested Felder on a disorderly conduct charge that was later dropped, Felder filed a state court action against the city and certain of the officers under section 1983. He alleged that the beating and arrest were racially motivated and violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. The officers moved to dismiss the suit because of Felder's failure to comply with Wisconsin's notice-of-claim statute. The statute provided, in part, that: before suit may be brought in state court against a state or local governmental entity or officer, the plaintiff, within 120 days of the alleged injury, must notify the defendant of the circumstances and amount of the claim and the plaintiff's intent to hold the named defendant liable; the defendant then had 120 days to grant or disallow the requested relief; and the plaintiff must bring suit within six months of receiving notice of disallowance. 487 U.S. at 134-37, 108 S.Ct. at 2305-06, 101 L.Ed.2d at 135-37.

The Felder Court held that when a section 1983 action is brought in the state court, Wisconsin's notice-of-claim statute conflicted in both its purpose and

effect with section 1983's remedial objectives and was preempted pursuant to the Supremacy Clause. The court explained that while states retain the authority to prescribe the rules and procedures governing suits in their courts, that authority does not permit states to place conditions on the vindication of a federal right. Rather, congress meant to provide individuals immediate access to the federal courts and did not contemplate that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the state officials whose hostility to those rights precipitated their injuries. 487 U.S. at 147-53, 108 S.Ct. at 2311-14, 101 L.Ed.2d at 143-47.

The Felder court found no merit to the claim that the exhaustion requirement imposed by the state statute is essentially de minimis because the statutory settlement period entailed none of the additional expense or undue delay typically associated with administrative remedies, the statutory scheme did not eliminate a claimant's right to seek full compensation through suit or the statutory scheme was designed to sift out specious claims. That court emphasized that section 1983 actions "belong in court" and exist independent of any other legal or administrative relief that may be available as a matter of federal or state law except where congress has expressly imposed an exhaustion

requirement.[13] The court said that any scheme designed to sift out "specious claims" from the stream of complaints that can inundate local governments in the absence of sovereign immunity is "manifestly inconsistent" with the central objective of the civil rights statutes. 487 U.S. at 148-50, 108 S.Ct. at 2312-13, 101 L.Ed.2d at 144-45.

We now address the critical question of whether the common pleas courts of this Commonwealth must entertain section 1983 cases without requiring the exhaustion of state administrative and judicial remedies. We do not have direction from the United States Supreme Court on this issue; rather, we have competing lines of cases and are asked to resolve the apparent conflict.

One may argue that, according to U.S. Supreme Court precedent, the taxpayers should be no

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[13] Congress did establish an exhaustion requirement for a specific class of section 1983 actions, those brought by adult prisoners challenging the conditions of their confinement, in the Civil Rights of Institutionalized Persons Act of 1980, 94 Stat. 353, 42 U.S.C. §1997e. In Felder, the Court stated that congress, in enacting this statute, expressly recognized that it was working a change in the law. 487 U.S. at 149, 108 S.Ct. at 2312, 101 L.Ed.2d at 144.

better off in state court than they are in federal court with regard to a section 1983 case challenging the constitutionality of a property tax assessment procedure. According to Fair Assessment and its progeny, plaintiffs must exhaust state administrative and judicial remedies in a property tax assessment case before bringing a section 1983 action in federal court. Therefore, the argument continues, the taxpayers must also exhaust state administrative and judicial remedies before bringing a section 1983 action challenging the constitutionality of a property tax assessment procedure in state court.

One may also argue that, according to U.S. Supreme Court precedent, this court cannot require exhaustion of state statutory remedies. If an exhaustion requirement were imposed on the taxpayers, then, like Felder, the state has a procedure that places conditions on the vindication of a federal right in state court. This is so even though the state's statutory scheme does not eliminate a claimant's right to seek full compensation through suit. Further, we are mindful that the taxpayers' case has another aspect that was not present in Felder, which is that exhaustion of state administrative and judicial remedies in the taxpayers' case may entail the additional expense and delay typically associated with state statutory remedies without according the taxpayers the relief sought. See, Borough of Greentree v. Board of

Property Assessment, Appeals and Review of Allegheny County, 459 Pa. 268, 328 A.2d 819 (1974).[14]

Here, the record reflects that the taxpayers have exhausted state administrative procedures and, without pursuing their state judicial remedies, seek to maintain a section 1983 class action. In this case, Felder and Howlett command the Court of Common Pleas of Berks County to exercise jurisdiction over a section 1983 action without requiring the complete exhaustion of state statutory remedies. While exhaustion of state statutory remedies is required in federal courts, exhaustion is not required in the courts of this state insofar as the action is a class action challenging the constitutionality of a system of property tax assessment. This is so because the principle of comity that causes a federal court to

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[14] In Greentree, this Court ruled that courts of common pleas have equitable jurisdiction to hear cases charging that the Assessment Act provision permitting triennial assessments violated the uniformity clause of the State Constitution and the equal protection clause of the Federal Constitution, where the statutory appeal procedure appearing in the Assessment act would be of little, if any, utility in determining constitutionality of the provision and where any benefit derived from filing individual appeals with the county board of property assessment would be far outweighed by the inconvenience, delay and expense involved.

refrain from exercising jurisdiction over section 1983 tax assessment cases has no relevance to a class action challenging, in state court, the constitutionality of a system of property tax assessment.

This creates the anomalous situation that plaintiffs have quicker access to state courts with respect to these types of section 1983 class actions than to the federal courts. This result does not appear to conflict with any U.S. Supreme Court decision because the vindication of a federal right is not shackled by state rules of judicial administration. This resolution also does not appear to conflict with precedent of this Court. See Borough of Greentree, supra. Further, this resolution will not, as local governments contend, disrupt state and local tax administration because, as the taxpayers argue, constitutional challenges such as the taxpayers' class-action challenge probably will, in the long run, significantly reduce the inconvenience, inefficiency, delay and expense involved in countless individual lawsuits over the same issue in many different administrative and judicial forums.[15]

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[15] The local governments, on page 27 of their brief, state that because taxpayers do not press the issue on appeal, it is "undisputed that they can secure consideration of the constitutional objections before the board of assessment appeals and through de novo review in the court of common pleas." The local governments, however, argue the point no

On the other hand, if we were to refuse access to the courts before exhaustion of statutory remedies with respect to this type of class action, such refusal would conflict directly with U.S. Supreme Court directives. Therefore, we hold that where plaintiffs are a class of the taxpayers challenging the constitutionality of the system by which property tax assessments are made, they can maintain their section 1983 suit in common pleas court without first exhausting their statutory remedies.[16]

The Court of Common Pleas of Berks County properly determined that it had subject matter jurisdiction in this case and this matter is remanded to Commonwealth Court with direction to address the local governments' contentions contained in their appeal at 625 C.D. 1991.

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further, perhaps in recognition that the likelihood that the issue would be fully addressed, on the administrative side, by the very people who depend on the continued existence of the present scheme of things is quite small indeed.

16 We wait for another day to address the issue of whether an individual plaintiff, as opposed to a class of plaintiffs, can maintain a section 1983 action in common pleas court without exhausting state statutory remedies where the challenge is to an individual assessment and not a challenge to the entire system of property tax assessment.

Order of the Commonwealth Court reversed, and case remanded.

Mr. Justice Larsen did not participate in the decision of this case.

Mr. Justice Montemuro files a concurring opinion.

Mr. Justice Cappy files a dissenting opinion.

JUDGMENT ENTERED:

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CHIEF CLERK

[J-55-93]

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

| | | |
|---|---|---|
| MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH, et al., Appellants | : | No. 34 M.D. Appeal Docket 1992 |
| | : | Appeal from the Order of the Commonwealth Court dated January 9, 1992, Nos. 625 C.D. 1991 and 771 C.D. 1991, reversing the Amended Order of the Court of Common Pleas of Berks County dated March 7, 1991, at No. 5182-89 AD |
| v. | : | |
| COUNTY OF BERKS, et al., Appellees | : | |
| | : | 144 Pa. Cmwlth. 624, 601 A.2d 1352 (1992) |
| | : | ARGUED: March 8, 1993 |

CONCURRING OPINION

MR. JUSTICE MONTEMURO
DECIDED: NOVEMBER 10, 1993

By implication, the majority acknowledges that our courts have an obligation to entertain a 1983

challenge to a state tax despite the existence of a statutory remedy. Because I believe that our courts have always had such an obligation, I join the Opinion of the Court.

[J-55-93]

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

| | | |
|---|---|---|
| MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH, et al., Appellants | : | No. 34 M.D. Appeal Docket 1992 |
| | : | Appeal from the Order of the Commonwealth Court dated January 9, 1992, Nos. 625 C.D. 1991 and 771 C.D. 1991, reversing the Amended Order of the Court of Common Pleas of Berks County dated March 7, 1991, at No. 5182-89 AD |
| v. | : | |
| COUNTY OF BERKS, et al., Appellees | : | |
| | : | 144 Pa. Cmwlth. 624, 601 A.2d 1352 (1992) |
| | : | ARGUED: March 8, 1993 |

DISSENTING OPINION

MR. JUSTICE CAPPY

DECIDED: NOVEMBER 10, 1993

I respectfully dissent from the majority's holding that the Appellant class of taxpayers, who seek

to challenge the constitutionality of the property tax assessment system, may maintain their action under 42 U.S.C. §1983 in common pleas court without first exhausting their state statutory remedies. Although I do not disagree with the majority's background summary of the relevant law, I differ with the majority's resolution of the "apparent conflict" in the United States Supreme Court's "competing lines of cases." (Majority opinion at 12.)

First, it must be remembered that section 1983 creates a federal cause of action. The Supreme Court in Fair Assessment In Real Estate Association v. McNary, 454 U.S. 100, 102 S. Ct. 177, 70 L.Ed. 2d 271 (1981), specifically held that this federal action requires exhaustion of state administrative and judicial remedies due to the sensitive nature of state tax issues. It makes no sense to undercut the Court's interpretation of federal law. Further, I believe that interests of comity[1] dictate that state courts defer to the federal framework carefully established by the United States Supreme Court, just as the federal court in Fair

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[1] It is important to remember that comity works both ways. Judicial comity is "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

Assessment deferred to the state courts in fashioning a rule that would not disrupt a carefully fashioned state tax scheme. The majority's approach creates the anomalous result of encouraging federal claimants to flock to state courts to pursue section 1983 actions, when the precise purpose of the federal rule is to ensure that state courts may deal with the matter under state law first.

Moreover, the majority's approach virtually eliminates any opportunity for the state courts to examine the state tax scheme under the laws or Constitution of the Commonwealth. The precise concern for the sensitive nature of state tax schemes, which motivated the United States Supreme Court in Fair Assessment, should a fortiori motivate state courts to examine those schemes under state law first. The majority's approach obliterates this opportunity and, again, produces the incongruous result of creating a stronger, virtually exclusive federal forum for section 1983 claims in state court rather-than in federal court where the action should take priority.

The Supreme Court's decision in Felder V. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), in no way compels the majority's result. It must be remembered that for the state courts to require exhaustion of state remedies as a prerequisite to a section 1983 action would only be to impose upon plaintiffs in state court the same requirement that would be imposed upon them in federal court. Felder simply prohibits the application of a state rule where the rule conflicts with

the remedial objectives of section 1983 and its enforcement will "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court." 487 U.S. at 138. Ironically, the majority's refusal to impose an exhaustion requirement creates just such a situation where different outcomes will be reached in section 1983 litigation "based solely on whether the claim is asserted in state or federal court."

I believe that, in the circumstances of this case, the Court should defer to the framework established by the federal courts. Therefore, I must respectfully dissent.

EXHIBIT C

IN THE COMMONWEALTH COURT OF
PENNSYLVANIA

| | |
|---|---|
| GREENWICH TOWNSHIP, | : |
| MARION TOWNSHIP, | : |
| BRECKNOCK TOWNSHIP, and | : |
| CENTRE TOWNSHIP, joined by | : |
| CAERNARVON TOWNSHIP, | : |
| BOROUGH OF KUTZTOWN, | : |
| BOROUGH OF ST. LAW- | : |
| RENCE, BOROUGH OF HAM- | : |
| BURG, BOROUGH OF | : |
| LAURELDALE, BOROUGH OF | : |
| WEST LAWN, SPRING TOWN- | : |
| SHIP, ROBESON TOWNSHIP, | : |
| OLEY VALLEY SCHOOL DIS- | : |
| TRICT, UPPER BERN TOWN- | : |
| SHIP, BOROUGH OF BECH- | : |
| TELSVILLE, BOROUGH OF | : |
| KENHORST, LEESPORT BOR- | : |
| OUGH, COLEBROOKDALE | : |
| TOWNSHIP, CUMRU TOWN- | : |
| SHIP, MUHLENBERG TOWN- | : |
| SHIP, CONRAD WEISER | : |
| SCHOOL DISTRICT, BOROUGH | : |
| OF CENTERPORT, BOYER- | : |
| TOWN AREA SCHOOL DIS- | : |
| TRICT, DANIEL BOONE AREA | : |
| SCHOOL DISTRICT, EXETER | : |
| TOWNSHIP SCHOOL DIS- | : |
| TRICT, FLEETWOOD AREA | : |

| | | |
|---|---|---|
| SCHOOL DISTRICT, GOVERNOR MIFFLIN SCHOOL DISTRICT, KUTZTOWN AREA SCHOOL DISTRICT, MUHLENBERG SCHOOL DISTRICT, CITY OF READING SCHOOL DISTRICT, SCHUYLKILL VALLEY SCHOOL DISTRICT, WILSON SCHOOL DISTRICT, WYOMISSING AREA SCHOOL DISTRICT, HAMBURG SCHOOL DISTRICT and TWIN VALLEY SCHOOL DISTRICT, | : | |
| Appellants | : | No. 625 C.D. 1991 |
| v. | : | |
| MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH, MARY S. MURTAGH and ANTHONY GIGLIOTTI and GEORGE CHOVANES, MARGARET CHOVANES, MICHAEL CHOVANES and LRM ZIEGENFUSS, a Pennsylvania Partnership, and CONCETTA C. GOOD, on behalf of themselves and all owners of real property situated in BERKS COUNTY who purchased their | : | |

property since January 1, 1980, :
and COUNTY OF BERKS, :
COMMONWEALTH OF :
PENNSYLVANIA, BERKS :
COUNTY BOARD OF ASSESS- :
MENT APPEALS, BOROUGH :
OF TOPTON, LOWER ALSACE :
TOWNSHIP, CITY OF :
READING, BOROUGH OF :
BALLY, BOROUGH OF BOYER- :
TOWN, BOROUGH OF FLEET- :
WOOD, BOROUGH OF LEN- :
HARTSVILLE, BOROUGH OF :
LYONS, BOROUGH OF MOHN- :
TON, BOROUGH OF MT. :
PENN, BOROUGH OF ROBE- :
SONIA, BOROUGH OF SHIL- :
LINGTON, BOROUGH OF :
SHOEMAKERSVILLE, BOR- :
OUGH OF SINKING SPRING, :
BOROUGH OF STRAUSSTOWN, :
BOROUGH OF TEMPLE, BOR- :
OUGH OF TOPTON, BOROUGH :
OF WERNERSVILLE, BOR- :
OUGH OF WOMELSDORF, :
BOROUGH OF WYOMISSING, :
ALBANY TOWNSHIP, ALSACE :
TOWN SHIP, AMITY TOWN- :
SHIP, BERN TOWNSHIP, :
BETHEL TOWNSHIP, DIS- :
TRICT TOWNSHIP, EARL :

TOWNSHIP, EXETER TOWN- :
SHIP, HEREFORD TOWNSHIP, :
JEFFERSON TOWNSHIP, :
LONGSWAMP TOWNSHIP, :
LOWER ALSACE TOWNSHIP, :
MAIDENCREEK TOWNSHIP, :
MAXATAWNY TOWNSHIP, :
NORTH HEIDELBERG TOWN- :
SHIP, ONTELAUNEE TOWN- :
SHIP, PENN TOWNSHIP, :
PERRY TOWNSHIP, PIKE :
TOWNSHIP, RICHMOND :
TOWNSHIP, ROCKLAND :
TOWNSHIP, RUSCOMBMANOR :
TOWNSHIP, SOUTH HEIDEL- :
BERG TOWNSHIP, UNION :
TOWNSHIP, UPPER TULPE- :
HOCKEN TOWNSHIP, WASH- :
INGTON TOWNSHIP, WIND- :
SOR TOWNSHIP, ANTIETAM :
SCHOOL DISTRICT, BRANDY- :
WINE HEIGHTS AREA :
SCHOOL DISTRICT, TULPE- :
HOCKEN AREA SCHOOL DIS- :
TRICT, UPPER PERKIOMEN :
VALLEY SCHOOL DISTRICT, :
BOROUGH OF WYOMISSING :
HILLS, BOROUGH OF BIRDS- :
BORO, BOROUGH OF WEST :
READING, TOWNSHIP OF :
HEIDELBERG, TOWNSHIP OF :

| | | |
|---|---|---|
| LOWER HEIDELBERG, TOWN- | : | |
| SHIP OF OLEY, TOWNSHIP OF | : | |
| TILDEN, TOWNSHIP OF | : | |
| UPPER TULPEHOCKEN, | : | |
| TOWNSHIP OF DOUGLASS, | : | |
| Appellants | : | |
| | : | |
| v. | : | No. 771 C.D. 1991 |
| | : | |
| MERRY J. MURTAGH, | : | |
| SPENCER LEE CHERASHORE, | : | |
| FREDERICK MURTAGH, | : | |
| MARY S. MURTAGH and | : | |
| ANTHONY GIGLIOTTI and | : | |
| GEORGE CHOVANES, | : | |
| MARGARET CHOVANES, | : | |
| MICHAEL CHOVANES and | : | |
| LRM ZIEGENFUSS, a | : | |
| Pennsylvania Partnership, and | : | |
| CONCETTA C. GOOD, on | : | |
| behalf of themselves and all | : | |
| owners of real property situated in | : | |
| BERKS COUNTY who purchased | : | |
| their property since January 1, | : | |
| 1980, and COUNTY OF BERKS, | : | |
| COMMONWEALTH OF | : | |
| PENNSYLVANIA, BERKS | : | |
| COUNTY BOARD OF | : | |
| APPEALS, GREENWICH | : | |
| TOWNSHIP, MARION TOWN- | : | |
| SHIP, BRECKNOCK TOWN- | : | |

SHIP and CENTRE TOWNSHIP, :
joined by CAERNARVON :
TOWNSHIP, BOROUGH OF :
KUTZTOWN, BOROUGH OF :
ST. LAWRENCE, BOROUGH :
OF HAMBURG, BOROUGH OF :
LAURELDALE, BOROUGH OF :
WEST LAWN, SPRING TOWN- :
SHIP, ROBESON TOWNSHIP, :
OLEY VALLEY SCHOOL DIS- :
TRICT, UPPER BERN TOWN- :
SHIP, BOROUGH OF :
BECHTELSVILLE, BOROUGH :
OF KENHORST, LEESPORT :
BOROUGH, :
COLEBROOKDALE TOWN- :
SHIP, CUMRU TOWNSHIP, :
MUHLENBERG TOWNSHIP, :
CONRAD WEISER SCHOOL :
DISTRICT, BOROUGH OF :
CENTERPORT, BOYERTOWN :
AREA SCHOOL DISTRICT, :
DANIEL BOONE AREA :
SCHOOL DISTRICT, EXETER :
TOWNSHIP SCHOOL DIS- :
TRICT, FLEETWOOD AREA :
SCHOOL DISTRICT, :
GOVERNOR MIFFLIN :
SCHOOL DISTRICT, :
KUTZTOWN AREA SCHOOL :
DISTRICT, MUHLENBERG :

SCHOOL DISTRICT, CITY OF :
READING SCHOOL DISTRICT, :
SCHUYLKILL VALLEY :
SCHOOL DISTRICT, WILSON :
SCHOOL DISTRICT, :
WYOMISSING AREA SCHOOL :
DISTRICT, HAMBURG :
SCHOOL DISTRICT and TWIN :
VALLEY SCHOOL DISTRICT, :
BOROUGH OF TOPTON, :
LOWER ALSACE TOWNSHIP, :
CITY OF READING, BOR- :
OUGH OF BALLY, BOROUGH :
OF BOYERTOWN, BOROUGH :
OF FLEETWOOD, BOROUGH :
OF LENHARTSVILLE, BOR- :
OUGH OF LYONS, BOROUGH :
OF MOHNTON, BOROUGH OF :
MT. PENN, BOROUGH OF :
ROBESONIA, BOROUGH OF :
SHILLINGTON, BOROUGH OF :
SHOEMAKERSVILLE, BOR- :
OUGH OF SINKING SPRING, :
BOROUGH OF :
STRAUSSTOWN, BOROUGH :
OF TEMPLE, BOROUGH OF :
TOPTON, BOROUGH OF :
WERNERSVILLE, BOROUGH :
OF WOMELSDORF, BOROUGH :
OF WYOMISSING, ALBANY :
TOWNSHIP, ALSACE TOWN- :

| | | |
|---|---|---|
| SHIP, AMITY TOWNSHIP, | : | |
| BERN TOWNSHIP, BETHEL | : | |
| TOWNSHIP, DISTRICT TOWN- | : | |
| SHIP, EARL TOWNSHIP, | : | |
| EXETER TOWNSHIP, | : | |
| HEREFORD TOWNSHIP, | : | |
| JEFFERSON TOWNSHIP, | : | |
| LONGSWAMP TOWNSHIP, | : | |
| LOWER ALSACE TOWNSHIP, | : | |
| MAIDENCREEK TOWNSHIP, | : | |
| MAXATAWNY TOWNSHIP, | : | |
| NORTH HEIDELBERG TOWN- | : | |
| SHIP, ONTELAUNEE TOWN- | : | |
| SHIP, PENN TOWNSHIP, | : | |
| PERRY TOWNSHIP, PIKE | : | |
| TOWNSHIP, RICHMOND | : | |
| TOWNSHIP, ROCKLAND | : | |
| TOWNSHIP, | : | |
| RUSCOMBMANOR TOWN- | : | |
| SHIP, SOUTH HEIDELBERG | : | |
| TOWNSHIP, UNION TOWN- | : | |
| SHIP UPPER TULPEHOCKEN | : | |
| TOWNSHIP, WASHINGTON | : | |
| TOWNSHIP, WINDSOR TOWN- | : | |
| SHIP, ANTIETAM SCHOOL | : | |
| DISTRICT, BRANDYWINE | : | |
| HEIGHTS AREA SCHOOL DIS- | : | |
| TRICT, TULPEHOCKEN AREA | : | |
| SCHOOL DISTRICT, UPPER | : | |
| PERKIOMEN VALLEY | : | ARGUED |
| SCHOOL DISTRICT | : | December 7, 1994 |

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE SANDRA SCHULTZ NEWMAN, Judge

OPINION BY JUDGE KELLEY FILED: May 26, 1995

Greenwich Township et al. and Borough of Wyomissing Hills et al. (Local Governments) appeal an order of the Court of Common Pleas of Berks County (trial court) finding that Merry J. Murtagh et al. (Taxpayers) have stated a cause of action against the Local Governments for their taxing policies which allegedly violate the Taxpayers' civil rights under 42 U.S.C. §1983.[1]

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[1] This appeal is before this court on remand from our Supreme Court. This court initially entered a decision in this case on January 9, 1992, wherein we determined that the trial court lacked subject matter jurisdiction over Taxpayers' section 1983 claims because the General and Third Class County

## I. FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history as substantially set forth in our decision in Greenwich I is as follows. Taxpayers, representing a class of recent purchasers of real property in Berks County, a third Class County, filed a complaint against the County of

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Assessment Laws provided Taxpayers with a plain, adequate and complete remedy. Accordingly, we reversed the trial court's order and remanded with instructions to dismiss the entire action for lack of subject matter jurisdiction. See Greenwich Township v. Murtagh, 144 Pa. Commonwealth Ct. 624, 601 A.2d 1352 (1992) (hereinafter referred to as Greenwich I).

Taxpayers appealed our decision to the Supreme Court which reversed our holding that Taxpayers could maintain a section 1983 suit without first exhausting statutory remedies. Accordingly, our Supreme Court reversed and remanded this matter to this court with directions to address the Local Governments' contentions contained in the present appeal regarding the issue of whether the Local Governments are proper parties to the section 1983 action. See Murtagh v. County of Berks, 535 Pa. 50, 634 A.2d 179 (1993), cert. denied, ____ U.S. ____, 114 S.Ct. 1397 (1994).

Berks (County) and the Berks County Board of Assessment Appeals (Board), alleging that they had adopted a so-called "Welcome Stranger" policy. Taxpayers alleged that under that policy, recently purchased properties were re-assessed at fair market value, resulting in significantly higher tax assessments than those on other comparable longer-held neighboring properties which were not re-assessed under the practice. Taxpayers alleged that the County and the Board's practice violated their equal protection rights under the Fourteenth Amendment[2] and, because the re-assessments were done under color of state law, there was a violation of 42 U.S.C. § 1983.

The County and the Board filed a number of preliminary objections to Taxpayers' complaint, only one of which the trial court sustained finding that Taxpayers had failed to sue the local governments who levied taxes which were indispensable parties. As a result, Taxpayers filed an amended complaint joining all taxing authorities in the County, nearly 100 boroughs,

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[2] Taxpayers rely principally on Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336 (1989), where the Supreme Court overturned a West Virginia supreme court decision, and held that this type of "Welcome Stranger" policy violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

townships and school districts.[3] Many of the newly joined local government defendants again filed preliminary objections to the amended complaint. The only preliminary objections at issue herein are demurrers to the amended complaint averring that the amended complaint failed to state a cause of action against the Local Governments for their taxing policies which allegedly violated section 1983.

The trial court dismissed the Local Governments' preliminary objections in the nature of a demurrer and held that the amended complaint stated a cause of action against the Local Governments under section 1983. The trial court rejected the Local Governments' contention that they are not proper parties to the section 1983 action because they were not involved in determining the assessments, which were done solely by the Board. The trial court determined that Local Governments should be party defendants because they were the recipients of the alleged improper taxes, and did in fact levy the taxes. Thereafter, the trial court certified

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[3] The amended complaint also joined the City of Reading as a party defendant; however, counsel stated during oral argument before this court regarding this appeal that the City of Reading has been dismissed as a defendant to this action.

the issue for appeal pursuant to Pa.R.A.P. 1311(b).[4] Subsequently, this court granted separate petitions for permission to appeal an interlocutory order filed by the Local Governments and consolidated the appeals.

## II. DISCUSSION

Now that our Supreme Court has decided that Taxpayers may maintain a section 1983 suit without first exhausting statutory remedies, the issue presented for review to this court, on remand, is whether the trial court erred in dismissing the Local Governments' preliminary objections in the nature of a demurrer where the Local Governments do not have the power or authority to set property assessments.[5]

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[4] Under Pa.R.A.P. 1311(b), a party may file a petition for permission to appeal to this Court when the trial court's interlocutory order contains the statement prescribed in 42 Pa. C.S. § 702(b). The trial court's order satisfied this requirement by stating that "[t]his order is deemed to involve a controlling question of law as to which there is a substantial ground for difference of opinion. An immediate appeal from the order may materially advance the ultimate determination of this matter."

[5] We note that when reviewing preliminary objections in the nature of a demurrer, we accept as true all well-pleaded material facts in the complaint as well as all reasonable inferences that may be drawn from

Section 1983 provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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those facts. Philadelphia v. Estate of Dennis, 161 Pa. Commonwealth Ct. 69, 636 A.2d 240 (1993). Preliminary objections should be sustained and a complaint dismissed only in cases that are clear and free from doubt that the law will not permit recovery by the plaintiff. Id. The test is whether, from all the facts pled, the pleader will be able to prove facts legally sufficient to establish his or her right to relief. Id.

42 U.S.C. § 1983.

Under section 1983, local governments are considered "persons" who may be directly liable when a policy statement, ordinance, regulation, or decision officially adopted and promulgated by a local government or municipality causes an employee, acting under the color of law, to violate another's constitutional rights. Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978). A local government may also be held liable when a "custom" of the governing body causes a constitutional deprivation even though such a custom has not received formal approval through the body's official decision making channels. Id.

A local government cannot be held liable under section 1983 on a respondeat superior theory. Id. Instead, it is when the execution of a local government's policy, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the local government as an entity is responsible under section 1983. Id.

Since Monell was decided, the United States Supreme Court has developed further the contours of municipal liability under section 1983. In Pembaur v. City of Cincinnati, 475 U.S. 469, 482 (1986), the Supreme Court in addressing when a municipality is responsible for its actions, opined that not every decision by an officer of a local government automatically

subjects the municipality to section 1983 liability. The Pembaur court stated that:

> Municipal liability attaches only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official -- even a policymaking official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion . . . . The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final

> policymaking authority is a question of state law . . . . We hold that municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 481-83 (citations and footnotes omitted).

The Supreme Court in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), reiterated that the identification of policymaking officials is a question of state law. The Praprotnik court pointed out that:

> The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts,

> one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies . . . . [W]e can be confident that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business.

Id. at 124-25 (citations and footnotes omitted).

In the present case, the Local Governments contend that since they cannot be liable under a theory of respondeat superior, to maintain their cause of action, Taxpayers must aver and prove culpable conduct on the part of the Local Governments. Specifically, that the Local Governments had some power and authority over the property tax assessment process which allegedly injured Taxpayers. Local Governments argue that they have no power or authority to adopt, implement or execute ordinances, regulations, customs or policies pertaining to the assessment of real property as this power and authority is exclusively

statutorily vested in the Board. Further, the Local Governments contend that they could not delegate an authority which they do not possess.[6]

In response, the Board and the County argue that the trial court properly denied the Local Governments' demurrers for three reasons. First, if the Local Governments are dismissed from this case, the Board and the County might be required to pay money to Taxpayers representing taxes the Local Governments collected. According to the Board and the County, this result would be unfair and contrary to Pennsylvania law, which requires the Local Governments to refund excess taxes they collect even if the overpayment was caused solely by an improper assessment.

Second, the Local Governments are liable under section 1983 for constitutional violations by

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[6] The Pennsylvania School Boards Association, Pennsylvania State Association of Boroughs, and the Pennsylvania State Association of Township Supervisors have filed an amici curiae brief in support of Local Governments' position in this appeal.

The County Commissioners Association of Pennsylvania has filed a brief of amicus curiae supporting the position of the County and the Board.

officials who have final policymaking authority to act on their behalf. The Board and the County contend that the General Assembly has the power to delegate authority for section 1983 purposes, without any action or consent by the Local Governments. Third, the amended complaint states a section 1983 claim based on the Local Government's own conduct, as well as the Board's conduct.

~~—Pursuant~~ to the General County Assessment Law (GCAL)[7] and the Third Class County Assessment Law (TCCAL),[8] a board of assessment appeals, appointed by the county commissioners of third class counties, is vested with the statutory authority to make and have supervision of the making of annual assessments of property made subject to assessment for taxation for county, borough, town, townships, school, poor and institution district purposes. Section 3 of TCCAL, 72 P.S. § 5344. In addition, the board of assessment appeals is vested with the statutory authority to make and have supervision of the listing and valuation of property excluded or exempted from taxation. Id.

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[7] Act of May 22, 1933, P.L. 853, as amended, 72 P.S. §§ 5020-101 - 5020-602.

[8] Act of June 26, 1931, P.L. 1379, as amended, 72 P.S. §§ 5342-5350j.2. This act does not have an official name but is commonly referred to as the Third Class County Assessment Law.

Under this scheme, the board of assessment appeals appoints assessors to make the annual valuation of all property subject to assessment for taxation. See section 4 through 6 of TCCAL, 72 P.S. §§ 5345-5347.

The assessment of properties by the board of assessment appeals must be equal and uniform. See section 7 of TCCAL, 72 P.S. § 5348(d); see City of Lancaster v. Lancaster County, 143 Pa. Commonwealth Ct. 476, 599 A.2d 289 (1991), petition for allowance of appeal denied, 530 Pa. 634, 606 A.2d 903 (1992). The board of assessment appeals is required to maintain an assessment roll and must annually notify the property owners of the value of the assessment pertaining to their property and any person or taxing district aggrieved by, any assessment may appeal to the board for relief. See section 8 of TCCAL, 72 P.S. § 5349.

After any appeals have been completed, a copy of the final annual assessment roll must be provided to the chief clerk of the county commissioners and to each taxing district. Id. If a mathematical or clerical error is made with regard to an assessment, the board of assessment appeals must inform the appropriate taxing district. See section 8.4 of TCCAL, added by Act of October 9, 1986, P.L. 1418, 72 P.S. § 5349.4. Thereafter, the taxing district must refund to the taxpayer any overpayment made as a result of the error. Id. Reassessment, with or without application by the owner, as a decision of judgment based on the method of

assessment by the board of assessment appeals, shall not constitute an error under section 8.4.[9]

Recognizing the guiding principles set forth by the United States Supreme Court and the statutory scheme adopted by the Pennsylvania General Assembly, this court believes that the Local Governments are not proper parties to Taxpayers' section 1983 action. It is clear from the statutory scheme that the Board and the County are the governmental bodies with final policymaking authority with regard to the supervision and method of assessments of real property in the County.

The County and the Board argue that the Local Governments possess the final policymaking authority with regard to property assessments based on the notion that the General Assembly has delegated that authority to the Board and the County on behalf of the Local Governments. We disagree. Clearly, the provisions of the GCAL and TCCAL reveal that the General Assembly, by legislative enactment, has granted directly to the Board and the County the authority to make municipal policy with respect to the supervision and method of real property assessments levied by the Local Governments.

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[9] This section applies to all errors on assessments discovered on or after January 1, 1981. 72 P.S. § 5349.4.

While the Local Governments do have a choice as to whether to levy their taxes based on county assessments, they elect to do so without also being the official governmental body responsible for establishing the supervision or method of assessment. Under the TCCAL, each local government entity, as a taxing district, is provided with the value of the assessments by the board. Although the value of that assessment may be challenged and appealed to the board by the Local Governments as taxing districts, it is the Board and not the Local Governments, which has the final determination, subject to further court appeal, as to the value of any assessment of real property. Therefore, the trial court's determination that the Local Governments can be held liable under section 1983 because they accepted the Board's actions without question and made no effort to require the Board to change its policy is incorrect.

By virtue of the fact that the Board and the County are responsible for making and setting the policy as to the manner and method of assessments to be utilized, only the Board's and the County's decisions in this area of governmental business can provide a basis for municipal liability. Plainly stated, the decisions of the Board and the County to act unlawfully are not the decisions of the Local Governments when it comes to the supervision or method of assessing real property in the County.

Further, we reject the Board's and the County's argument that the trial court's order should be affirmed because they may have to pay money to Taxpayers representing taxes the Local Governments collected which the Local Governments are obligated to repay under the TCCAL. The TCCAL provides that a taxing district must repay taxes incurred as a result of a mathematical or clerical error with regard to an assessment. Section 8.4 of TCCAL. Therefore, we do not read this provision of the TCCAL as requiring that the Local Governments remain parties to this federal section 1983 action for this reason.

This provision of the TCCAL aptly provides an avenue of relief to a taxpayer that has been overcharged due to a clerical or mathematical error. This provision does not provide that a taxing authority must pay damages arising out of litigation based on an overpayment of taxes resulting from illegal assessments made by the Board. Moreover, this provision of the TCCAL provides that reassessment "as a decision of judgment based on the method of assessment by the board, shall not constitute an error under this section." Id. This language indicates to this court that any grievance a person or taxing district may have with regard to the assessment of property in the County based on grounds other than a mathematical or clerical error must be resolved through other means.

A review of the amended complaint filed by Taxpayers reveals that the averments are insufficient

to hold the Local Governments liable in this section 1983 action. Taxpayers allege that the Local Governments are liable due to the fact that the Local Governments receive and levy the tax assessments. Since we have determined that the Local Governments are not the final policymakers with respect to the supervision, manner or method of the assessments upon which the Local Governments levy their taxes, the allegations of Taxpayers' amended complaint are insufficient to state a cause of action against the Local Governments under section 1983.

Accordingly, the order of the trial court is reversed and this matter is remanded to the trial court with instructions to dismiss, with prejudice, Taxpayers amended complaint with respect to the Local Governments.

JAMES R. KELLEY, Judge

Judge Friedman dissents.

## ORDER

NOW, this 26th day of May, 1995, the order of the Court of Common Pleas of Berks County, dated January 23, 1991, as amended by order dated March 6, 1991, is reversed and this matter is remanded with instructions to dismiss, with prejudice, appellees' amended complaint with respect to Greenwich Township et al. and Borough of Wyomissing Hills et al., appellants herein.

Jurisdiction relinquished.

DISSENTING OPINION BY JUDGE NEWMAN

FILED: May 26, 1995

Because I agree with the trial court that the General Assembly has delegated to the Berks County Board of Assessment (Board) the final policymaking authority to make assessments for Greenwich Township et al. and Borough of Wyomissing Hills et al. (Local Governments), I respectfully dissent.

In Monell v. Department of Social Services of City of New York 436 U.S. 658, 694 (1978) the Supreme Court stated, "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent the official policy, inflicts the injury that the government as an entity is responsible under §1983."

As the majority correctly notes, the Supreme Court in Pembaur V. City of Cincinnati, 475 U.S. 469, 481 (1986) refined the definition of "policy or custom" by holding that "[m]unicipal liability attaches only where the decisionmaker possesses final authority with respect to the action ordered." The court further stated that "[a]uthority to make municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law." Id. at 483.

Turning to the statute involved in this case, Section 5344(a) of the Third Class County Assessment Law (Law), 72 P.S. §5344(a) states:

> It shall be the duty of [the board of assessment appeals], in each county to which this act applies, to make and have supervision of the making of annual assessments of persons, property and occupations now or hereafter made subject to assessment for taxation of county, borough, town, township, school, poor and institution district purposes, and to make and have supervision of listing and valuation of property excluded or exempted from taxation. The making of triennial assessments as provided by existing law is hereby abolished.

72 P.S. §5344(a) (emphasis added).

The trial court correctly determined that the legislature, through Section 5344(a) of the Law, has given the Board final policymaking authority to make

assessments on behalf of local governments. This is a logical conclusion, because the statute has the effect of preventing local governments from performing their own assessments. If local governments wish to impose a tax, they must do so based upon the Board's assessment. As the Supreme Court noted in Pembaur, final policymaking authority can be granted to a governmental body through legislative enactment.

The majority recognizes that in St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988) the Supreme Court noted that states have great latitude in determining the forms that local government take. Consequently, "one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies." Id. at 124 - 125. In the instant matter, the state, acting through the legislature, has created a system whereby the authority to make tax assessments for local governments rests with the Board. This is consistent with Praprotnik, which stands for the proposition that the states have wide latitude in delegating policymaking authority for local governments.

Because final policymaking authority for making tax assessments on behalf of Local Governments is vested in the Board by statute, the conduct of the Board is identical to the conduct of local governments for purposes of a lawsuit brought under 42 U.S.C. §1983. Such an interpretation is consistent with Pembaur, where the Supreme Court held that municipal liability attaches

where the decisionmaker has final authority to establish policy. Therefore, the Local Governments are properly named as defendants in the instant civil rights action.

For these reasons, I respectfully dissent.

SANDRA SCHULTZ NEWMAN,
JUDGE

Judge Smith joins this dissent.
Judge Friedman joins in the conclusion of this dissenting opinion.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| GREENWICH TOWNSHIP et al., Appellants | : | |
| v. | : | No. 625 C.D. 1991 |
| MERRY J. MURTAGH et al. | : | |
| BOROUGH OF WYOMISSING HILLS et al. Appellants | : | |
| v. | : | No. 771 C.D. 1991 |
| MERRY J. MURTAGH et al. | : | |

AMENDED ORDER

NOW, this 27th day of June 1995, upon consideration of appellees' application for clarification and/or correction of the court's opinion dated May 26, 1995, and responses thereto, it is ORDERED that footnote 3 on page 3 is deleted.

JAMES R. KELLEY, Judge

EXHIBIT D

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

| | |
|---|---|
| MERRY J. MURTAGH, ET AL. | : No. 319 Middle |
| | : District |
| v. | : Allocatur Docket |
| | : 1995 |
| COUNTY OF BERKS, ET AL. | : |
| | : |
| PETITION OF: COUNTY OF BERKS AND THE BERKS COUNTY BOARD OF ASSESSMENT APPEALS AND MERRY MURTAGH | : Petition for Allowance of Appeal from Commonwealth Court |

ORDER

PER CURIAM:

AND NOW, this 22nd day of November, 1995, the Petition for Allowance of Appeal is hereby dismissed.

Mr. Justice Montemuro participates by designation as a senior judge as provided by Rule of Judicial Administration 701(f).

EXHIBIT E

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1257(a) of Title 28, United States Code, provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statues of, or any commission held or authority exercised under, the United States.

28 U.S.C. §1257(a).

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

Section 1983 of Title 42, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

> law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

Section 1341 of Title 28, United States Code (the Tax Injunction Act), provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

Article VII, Section 1 of the Pennsylvania Constitution provides:

All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

Pennsylvania Cons. Article VIII, § 1.

No. 95-1187

Supreme Court, U.S.
FILED
FEB 23 1996
CLERK

In The

# Supreme Court of the United States

October Term, 1995

BERKS COUNTY, PENNSYLVANIA, *et al.*,

*Petitioners,*

v.

MERRY J. MURTAGH, *et al.*,

*Respondents.*

On Petition For Writ Of Certiorari
To The Commonwealth Court Of Pennsylvania

## BRIEF IN OPPOSITION OF RESPONDENTS BOYERTOWN AREA SCHOOL DISTRICT, *ET AL.*

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## QUESTIONS PRESENTED FOR REVIEW

1. Is jurisdiction lacking under 28 U.S.C. §1257(a) because no final state court judgment exists?

2. Can petitioners obtain review of the Commonwealth Court of Pennsylvania's ruling in *Greenwich Township* v. *Murtagh*, 659 A.2d 1083 (1995), on the ground that *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), requires dismissal of this suit when (a) the Commonwealth Court in the decision immediately below did not address the issue decided in *National Private Truck Council* and (b) petitioners can obtain prompt dismissal based on *National Private Truck Council* in state court after this Court denies review?

3. Is this an appropriate case in which to grant review of the Commonwealth Court's ruling on the subject of municipal liability?

## PARTIES TO THE PROCEEDING

The respondents joining in this Brief in Opposition are Boyertown Area School District, Daniel Boone Area School District, Exeter Township School District, Fleetwood Area School District, Governor Mifflin School District, Hamburg Area School District, Kutztown Area School District, Muhlenberg School District, City of Reading School District, Schuylkill Valley School District, Twin Valley School District, Wilson School District, Wyomissing Area School District, Greenwich Township, Marion Township, Brecknock Township, Centre Township, Maxatawny Township, Borough of Bechtelsville, Borough of Kenhorst, Leesport Borough, Colebrookdale Township, Cumru Township, Muhlenberg Township, Upper Bern Township, Conrad Weiser School District, Borough of Wyomissing Hills, Borough of Birdsboro, Borough of West Reading, Township of Heidelberg, Township of Lower Heidelberg, Township of Oley, Township of Tilden, Township of Upper Tulpehocken, Township of Douglass, Borough of Kutztown, Borough of St. Lawrence, Borough of West Lawn, Borough of Hamburg, Borough of Laureldale, Oley Valley School District, Borough of Centerport, Upper Bern Township and Caernarvon Township.

The foregoing respondents have no parent companies or subsidiaries to list pursuant to Rule 29.6.

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## BRIEF IN OPPOSITION

Respondents Boyertown Area School District, *et al.*, respectfully pray that the petition for writ of certiorari sought in this matter be denied.

---

## OPINION BELOW

Petitioners Berks County and the Berks County Board of Assessment Appeals seek review of the opinion that the Commonwealth Court of Pennsylvania issued in this matter on May 26, 1995. That opinion is reported, *see Greenwich Township* v. *Murtagh*, 659 A.2d 1083 (Pa. Commw. Ct. 1995), and is reprinted in the appendix to the petition for writ of certiorari, App. to Pet. for Cert. 55-A to 85-A.

The Commonwealth Court's opinion addressed a single issue: whether the municipalities and school districts located in Berks County, Pennsylvania can be held liable under 42 U.S.C. §1983 for Berks County's allegedly unlawful property tax assessment practices even though, under state law, the municipalities and school districts have no power, authority or duty to assess real property located within their boundaries or to control the manner in which the Berks County Board of Assessment Appeals conducts assessments of real property.

Following the Commonwealth Court's ruling, Berks County and the Berks County Board of Assessment Appeals filed a petition for allowance of appeal seeking discretionary review in the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania dismissed the

petition for allowance of appeal in an order dated November 22, 1995. The Supreme Court of Pennsylvania's order is not yet reported but is reprinted in the appendix to the petition for writ of certiorari. App. to Pet. for Cert. 87-A.

## JURISDICTION

Petitioners contend that jurisdiction exists to review the judgment of the Commonwealth Court of Pennsylvania pursuant to 28 U.S.C. §1257(a). In §1257(a), Congress conferred jurisdiction on this Court to review only "[f]inal judgments" of state courts. Respondents Boyertown Area School District, *et al.*, do not agree that the Commonwealth Court's judgment is final for purposes of §1257(a).

If this Court denies the petition for writ of certiorari, this action will return to the state trial court for further proceedings between plaintiffs Merry J. Murtagh, *et al.*, and defendants County of Berks and the Berks County Board of Assessment Appeals. Because the Commonwealth Court's judgment requires further state court proceedings, including pretrial proceedings and perhaps trial of this suit, no final judgment exists pursuant to 28 U.S.C. §1257(a).

Because jurisdiction is lacking in this Court, the petition for writ of certiorari should be denied.

## STATEMENT OF THE CASE

This case began in October of 1989 when Merry J. Murtagh and several other plaintiffs brought suit against Berks County and the Berks County Board of Assessment Appeals claiming that Berks County's property tax assessment practices deprived plaintiffs of their right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. *See* U.S. CONST. amend. XIV, §1. Plaintiffs' complaint contained a single claim for relief pursuant to 42 U.S.C. §1983.

In June of 1990, plaintiffs filed an amended complaint naming an additional ninety-four defendants. These ninety-four defendants were all of the municipalities and school districts located in Berks County. In every other respect, plaintiffs' amended complaint was identical to their original complaint. In particular, plaintiffs' amended complaint continued to assert only a single claim for relief pursuant to 42 U.S.C. §1983.

Many of the newly added municipality and school district defendants, including the respondents that have joined in this Brief in Opposition, filed preliminary objections to plaintiffs' amended complaint. Among the grounds asserted in those preliminary objections were the following: (1) state courts in Pennsylvania are prohibited from entertaining challenges to local taxation brought pursuant to 42 U.S.C. §1983 because state law provides an adequate remedy to vindicate taxpayers' rights; and (2) the municipalities and school districts joined as defendants in the amended complaint cannot be held liable under 42 U.S.C. §1983 because, under state law, these

municipalities and school districts have no power, authority or duty to assess real property located within their boundaries or to control the manner in which the Berks County Board of Assessment Appeals conducts assessments of real property located in Berks County.

The trial court overruled all of the preliminary objections to plaintiffs' amended complaint but permitted defendants to take an interlocutory appeal. On January 9, 1992, the Commonwealth Court issued its first opinion in this matter. *See Greenwich Township* v. *Murtagh*, 144 Pa. Commw. 624, 601 A.2d 1352 (1992) (*Murtagh I*). The Commonwealth Court held that state courts must refrain from entertaining 42 U.S.C. §1983 tax challenges where state law offers a plain, adequate and complete remedy. *See Murtagh I*, 144 Pa. Commw. at 632, 601 A.2d at 1356. The Commonwealth Court also examined whether the remedies available to plaintiffs under Pennsylvania law are adequate to vindicate plaintiffs' federal rights and concluded that they are. *Id.* at 636-37, 601 A.2d at 1358-59. Accordingly, the Commonwealth Court ordered the dismissal of plaintiffs' amended complaint as to all defendants without examining the other issues that the municipality and school district defendants had raised in their appeal.

Thereafter, plaintiffs filed a petition for allowance of appeal to the Supreme Court of Pennsylvania seeking review of the Commonwealth Court's ruling in *Murtagh I*. In their petition, plaintiffs argued that federal law (in particular the Supremacy Clause of the United States Constitution) required state courts to entertain 42 U.S.C. §1983 tax challenges despite the existence of adequate

state law remedies. The Supreme Court of Pennsylvania granted discretionary review.

In *Murtagh* v. *County of Berks*, 535 Pa. 50, 634 A.2d 179 (1993) (*Murtagh II*), *cert. denied*, 114 S. Ct. 1397 (1994), Pennsylvania's highest court ruled that federal law requires state courts to entertain 42 U.S.C. §1983 tax challenges even where plain, adequate and complete state law remedies exist. Accordingly, the Supreme Court of Pennsylvania in *Murtagh II* reversed the Commonwealth Court's judgment in *Murtagh I* and remanded this case to the Commonwealth Court for consideration of the other issues the municipalities and school districts had raised in their appeal to the Commonwealth Court in *Murtagh I*.

On remand to the Commonwealth Court, the municipalities and school districts renewed their argument that they could not be held liable under 42 U.S.C. §1983 for Berks County's property tax assessment practices because state law assigned sole responsibility for those practices to the Berks County Board of Assessment Appeals. Agreeing with that argument, the Commonwealth Court held on remand that all defendants other than Berks County and the Berks County Board of Assessment Appeals had to be dismissed. *See Greenwich Township* v. *Murtagh*, 659 A.2d 1083 (Pa. Commw. Ct. 1995) (*Murtagh III*).

The Commonwealth Court ruled that only parties possessing final policymaking authority can be held liable under 42 U.S.C. §1983 for an unconstitutional governmental practice. *See Murtagh III*, 659 A.2d at 1088-89. The court concluded, with respect to Berks County's allegedly unconstitutional property tax assessment practices, that

final policymaking authority under state law resided in the Berks County Board of Assessment Appeals. *See id.*

Dissatisfied with the Commonwealth Court's ruling in *Murtagh III*, Berks County and the Berks County Board of Assessment Appeals sought discretionary review in the Supreme Court of Pennsylvania. In an order dated November 22, 1995, the Supreme Court of Pennsylvania dismissed the petition for allowance of appeal that Berks County and the Berks County Board of Assessment Appeals had filed. App. to Pet. for Cert. 87-A.

Earlier, on June 19, 1995, this Court issued its ruling in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995). This Court, citing in a footnote to the Supreme Court of Pennsylvania's ruling in *Murtagh II*, *see National Private Truck Council*, 115 S. Ct. at 2354 n.3, explained that "[w]e granted certiorari to resolve a conflict among the state courts as to whether, in tax cases, state courts must provide relief under §1983 when adequate remedies exist under state law," *id.* at 2354.

This Court proceeded to hold, in a unanimous ruling, that state courts must refrain from entertaining 42 U.S.C. §1983 tax challenges where state law provides an adequate remedy. *See National Private Truck Council*, 115 S. Ct. at 2355-57. In so holding, this Court expressly overruled the Supreme Court of Pennsylvania's decision in *Murtagh II*.[1]

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[1] The plaintiffs in *National Private Truck Council* sought declaratory and injunctive relief pursuant to 42 U.S.C. §1983, while the plaintiffs in *Murtagh* seek damages. This, however, is a

In light of this Court's recent decision in *National Private Truck Council* overruling the Supreme Court of Pennsylvania's holding in *Murtagh II*, it is clear that plaintiffs' 42 U.S.C. §1983 tax challenge against Berks County's property tax assessment practices must be dismissed. The judgment of the Commonwealth Court in *Murtagh III* dismisses all but two defendants from this suit. Given this Court's ruling in *National Private Truck Council*, the question whether the Commonwealth Court reached the right result in dismissing all but two defendants has been rendered academic, because now it is clear plaintiffs' suit must be dismissed as to *all defendants*.

Instead of granting the petition for writ of certiorari that Berks County and the Berks County Board of Assessment Appeals have filed, this Court should deny review, after which this case will return to the state trial court,

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distinction without a difference. In *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 113 (1981), this Court explained that the same principles that required courts to refuse to entertain tax challenges brought under 42 U.S.C. §1983 seeking declaratory and injunctive relief should also lead courts to refuse to entertain tax challenges brought under 42 U.S.C. §1983 seeking damages. As the Court wrote in *McNary*:

"Petitioners will not recover damages under §1983 unless a district court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment like that barred in *Great Lakes* [*Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943)]. We are convinced that such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity." *McNary*, 454 U.S. at 113.

where petitioners can rapidly obtain dismissal in light of this Court's ruling in *National Private Truck Council.*

## ARGUMENT

As the Court of last resort exercising discretionary review, this Court accepts cases only when there are "compelling reasons" to grant review. Sup. Ct. R. 10. No compelling reasons exist here.

The first question presented in the petition for writ of certiorari is not deserving of review. The municipalities and school districts who join in this Brief in Opposition agree with Berks County and the Berks County Board of Assessment Appeals that plaintiffs' lawsuit can no longer be maintained given this Court's recent ruling in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n,* 115 S. Ct. 2351 (1995). Nevertheless, once certiorari is denied, Berks County and the Berks County Board of Assessment Appeals will be able rapidly to obtain dismissal of plaintiffs' lawsuit when it returns to the state trial court.

The second question presented in the petition for writ of certiorari filed by Berks County and the Berks County Board of Assessment Appeals asks whether the Commonwealth Court correctly decided that the municipality and school district defendants could not be held vicariously liable under 42 U.S.C. §1983 for the allegedly unconstitutional property tax assessment practices engaged in by the Berks County Board of Assessment Appeals. While the Commonwealth Court's ruling in *Murtagh III* plainly was correct, that decision, even if incorrect, is not deserving of review in light of this

Court's recent ruling in *National Private Truck Council* that state courts are prohibited from entertaining 42 U.S.C. §1983 tax challenges where an adequate remedy exists under state law.

Stated plainly, it no longer makes any difference whether municipalities and school districts can be held liable under 42 U.S.C. §1983 for Berks County's allegedly unconstitutional property tax assessment practices now that this Court has ruled that both state and federal courts are barred from hearing tax challenges brought pursuant to 42 U.S.C. §1983. Accordingly, the second question presented in the petition filed by Berks County and the Berks County Board of Assessment Appeals is not deserving of review.

## I. Berks County And The Berks County Board of Assessment Appeals Will Be Able To Obtain The Prompt Dismissal Of This Suit In State Trial Court Now That This Court Has Confirmed That State Courts Are Barred From Entertaining 42 U.S.C. §1983 Tax Challenges

The municipalities and school districts who join in this Brief in Opposition agree with Berks County and the Berks County Board of Assessment Appeals that this Court's recent ruling in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), requires the prompt dismissal of this suit as to all defendants. It must be noted, however, that the issue this Court resolved in *National Private Truck Council* was not before the Commonwealth Court in the decision under review.

Currently, all but two defendants have been dismissed from this suit, and the dismissal of the remaining two defendants can be obtained most expeditiously in the trial court, which is bound under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, to give effect to this Court's ruling in *National Private Truck Council.*

The applicability of this Court's ruling in *National Private Truck Council* to this case is beyond doubt, as this Court has expressly overruled the Supreme Court of Pennsylvania's earlier ruling in *Murtagh II. See, e.g., National Private Truck Council,* 115 S. Ct. at 2354 n.3 (citing the Pennsylvania Supreme Court's ruling in *Murtagh II* as one of the decisions that this Court was overruling).

As the Court of last resort in this nation, this Court should reserve its precious judicial resources for cases truly deserving of review. This case plainly is not deserving of review, especially when the state trial court can easily apply *National Private Truck Council* and promptly dismiss the remaining two defendants from this suit after this Court denies the petition for writ of certiorari.

## II. This Court Should Not Grant Review To Determine Whether Municipalities And School Districts Can Be Held Liable In A 42 U.S.C. §1983 Tax Challenge For The Allegedly Unconstitutional Property Tax Assessment Practices Of The Berks County Board Of Assessment Appeals

### A. In light of this Court's recent decision holding that state courts should not entertain 42 U.S.C. §1983 tax challenges, it is unimportant that this issue be definitively resolved

The second question presented for review in the petition for writ of certiorari filed by Berks County and the

Berks County Board of Assessment Appeals is a question that is no longer relevant to this suit and that is destined never to arise again.

Last Term, this Court ruled in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), that state courts are prohibited from entertaining 42 U.S.C. §1983 tax challenges where state law provides an adequate remedy. As Berks County and the Berks County Board of Assessment Appeals recognize, *see* Pet. for Cert. 16, courts that have considered the issue have held that Pennsylvania's state law remedies are adequate. *See Murtagh I*, 144 Pa. Commw. at 636-37, 601 A.2d at 1358-59; *Behe* v. *Chester County Bd. of Assessment Appeals*, 952 F.2d 66, 68 (CA3 1991); *Garrett* v. *Bamford*, 582 F.2d 810, 817 (CA3 1978).

Accordingly, the second question presented in the petition for writ of certiorari, which asks whether municipalities and school districts may be held liable in a 42 U.S.C. §1983 tax challenge for the allegedly unconstitutional tax assessment practices of the Berks County Board of Assessment Appeals, is of no importance, because this 42 U.S.C. §1983 tax challenge is no longer sustainable in state court. *See National Private Truck Council.*

For similar reasons, the second question presented will never arise again, because all of the copycat 42 U.S.C. §1983 property tax assessment challenges that plaintiffs' lawyers have brought in other counties in Pennsylvania and in other States are also now due to be dismissed, *see National Private Truck Council*, and similar suits if filed in the future will be dismissed at the outset before the merits of the dispute are reached, *see id.*

Given this Court's ruling in *National Private Truck Council*, the question whether the Commonwealth Court reached the correct result in dismissing all but two defendants has been rendered academic, because now it is clear plaintiffs' suit must be dismissed as to *all defendants*. Instead of granting the petition for writ of certiorari filed by Berks County and the Berks County Board of Assessment Appeals, this Court should deny review, which will send this case back to the state trial court, where Berks County and the Berks County Board of Assessment Appeals can rapidly obtain dismissal in light of this Court's ruling in *National Private Truck Council*.

**B. The Commonwealth Court's ruling is correct**

Even if this entire case were not now subject to dismissal on the ground that this Court has recently held that state courts are prohibited from entertaining 42 U.S.C. §1983 tax challenges, this Court should still refrain from granting review.

In dismissing the municipalities and school districts from this suit, the Commonwealth Court correctly ruled that liability under 42 U.S.C. §1983 for an allegedly unconstitutional government policy rests only with the final policymaking authority. *See Murtagh III*, 659 A.2d at 1088-89. The Commonwealth Court's ruling is in accord with every decision of this Court to have considered that question. *See City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 123-27 (1988) (plurality opinion); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 478-80 (1986); *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 821 (1985) (plurality opinion); *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 692-94 (1978).

This Court has made clear that the question of which governmental entity has final policymaking authority for a given policy is a question of state law, *see Pembaur*, 475 U.S. at 483 (plurality opinion), and has further explained that a court "would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it," *Praprotnik*, 485 U.S. at 126 (plurality opinion).

Here, state law plainly and unambiguously assigns to the Berks County Board of Assessment Appeals the final policymaking authority for assessing property located within Berks County:

> "It shall be the duty of said board, in each county to which this act applies, to make and have supervision of the making of annual assessments of persons, property and occupations now or hereafter made subject to assessment for taxation for county, borough, town, township, school, poor and institution district purposes, and to make and have supervision of listing and valuation of property excluded or exempted from taxation." PA. STAT. ANN. tit. 72, §5344(a).

State law further requires the municipalities and school districts located in Berks County to use the assessments prepared by the County Board of Assessment Appeals in levying taxes. *See* PA. STAT. ANN. tit. 72, §5350f ("When the said valuations and assessments have been made, all taxation on real estate and personal assessments for county, borough, town, township, school purposes (except in cities), institution district, and poor purposes, within the limits of such county, shall be based upon such valuations and assessments.").

State law does not give municipalities and school districts located in Berks County any duty or authority to make, revise or control the assessment of real property. Rather, state law vests the power to make, revise and control the assessment of real property located in Berks County exclusively in the Berks County Board of Assessment Appeals. Because Pennsylvania's Legislature has placed the power to make, revise and control the assessment of real property exclusively in the Berks County Board of Assessment Appeals, any suggestion that municipalities and school districts have "delegated" this power (a power that the municipalities and school districts are not given by the Legislature in the first place) to the Board of Assessment Appeals is insupportable.

The Commonwealth Court correctly recognized that plaintiffs here seek to hold the municipalities and school districts vicariously liable for the allegedly unconstitutional acts of the Berks County Board of Assessment Appeals. *Murtagh III*, 659 A.2d at 1089. Under plaintiffs' theory, when the Board promulgates unconstitutional assessments, the municipalities and school districts would be liable under 42 U.S.C. §1983 for assessing taxes as required by state law, but when the Board promulgates constitutional assessments, no liability would attach to the municipalities and school districts.

The Commonwealth Court had no choice but to reject attempts to hold the municipality and school district defendants vicariously liable given the unbroken line of this Court's precedents rejecting the imposition of vicarious liability under 42 U.S.C. §1983. *See, e.g., Praprotnik*, 485 U.S. at 122 (plurality opinion) (noting that "vicarious liability would be incompatible with the causation

requirement set out on the face of §1983"); *Pembaur*, 475 U.S. at 479 ("§1983 could not be interpreted to incorporate doctrines of vicarious liability").

Because the Commonwealth Court correctly concluded that municipalities and school districts cannot be held liable for the allegedly unconstitutional property tax assessment practices engaged in by the Berks County Board of Assessment Appeals, this Court should not grant review of the second question presented in the petition for writ of certiorari filed by Berks County and the Berks County Board of Assessment Appeals.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 95-1187

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

COUNTY OF BERKS, PENNSYLVANIA, et al.,
Petitioners,

v.

MERRY J. MURTAGH, et al.,
Respondents.

Petition for a Writ of Certiorari
to the Commonwealth Court of Pennsylvania

## PLAINTIFFS'/RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the interlocutory judgments of the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania are "final order[s]" within the meaning of 28 U.S.C. § 1257(a).

2. Whether a state's highest court may permit adjudication under the Civil Rights Act, 42 U.S.C. § 1983, of a class action seeking damages only resulting from systematic equal protection violations from a county's "Welcome Stranger" policy of taxation.

## PARTIES TO THE PROCEEDING

Petitioners' statement of the parties to the proceedings is correct. Respondents herein have no parent or subsidiary companies to list pursuant to Rule 29.1.

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## JURISDICTION

For the reasons set forth in Point I, infra, Respondents contend that this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review the interlocutory orders herein.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1257(a) of Title 28, United States Code, provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

Section 1983 of Title 42, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

## STATEMENT OF THE CASE

Steadily increasing real estate values in Berks County, Pennsylvania created a gaping disparity among property assessments – and therefore taxes paid – between long-term residents and newcomers. Dubbed a "Welcome Stranger" policy, this practice requires newcomers to pay a disproportionate amount of taxes to support local government. Although mandated by State constitution and statute to use a "current value" system of real property taxation,[1] see Pa. Const. Art. VIII § 1; 72 Pa. C.S. § 5020-101 et seq., governmental entities in Berks County utilized a system of "spot assessment," that is, reassessment for property tax purposes of only those parcels which change ownership for a fair market value.

Seven years ago in Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336 (1989) this Court declared unconstitutional a West Virginia practice of de facto discrimination

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[1] A "current value" system requires that all property be taxed at a uniform rate according to its current estimated actual market value. By contrast, an "acquisition value" system, such as was approved by the Court in Nordlinger v. Hahn, 505 U.S. 1 (1992), assesses property only when it changes hands at its acquisition value.

engendered by a "Welcome Stranger" policy in a "current value" system of real property taxation. The property tax assessment practices in Berks County resemble the practices in West Virginia with one notable exception: while the West Virginia county had not performed a general reassessment for over ten years, Berks County never conducted a county-wide reassessment in its history. In short, the Petitioners' scheme of taxing real property in Berks County is constitutionally indefensible and the deprivations profound.

Respondents herein are recent residents and taxpayers in Berks County who filed this class action in state court alleging a single cause of action under the federal civil rights law, 42 U.S.C. § 1983, seeking damages for overpayment of taxes. The trial court required Respondents to join as party defendants certain local governments and school districts (hereinafter "the Local Taxing Authorities") and then overruled their demurrers to the Amended Complaint. The trial court then certified for appeal the issue of whether the Local Taxing Authorities could be liable under § 1983 for the wrongful assessment practices of the Board of Assessment Appeals. The Commonwealth Court, Pennsylvania's intermediate appellate court, never reached this issue. Instead, Commonwealth Court ruled that plaintiffs could not bring their § 1983 action in state court because state administrative and judicial remedies are plain, adequate and complete. Greenwich Township v. Murtagh, 144 Pa. Commw. 624, 601 A.2d 1352 (1992).

The Pennsylvania Supreme Court granted certiorari and reversed. The Pennsylvania Supreme Court ruled that:

> where plaintiffs are a class of the taxpayers challenging the constitutionality of the system by which property tax assessments are made, they can maintain their section 1983 suit in common pleas court without first exhausting their statutory remedies.

Murtagh v. County of Berks, 535 Pa. 50, 634 A.2d 179 (1993), cert. denied, 114 S.Ct. 1397 (1994) (hereinafter "Murtagh I"). The court specifically reserved decision on whether state statutory remedies are plain, adequate and complete, and remanded the case to the Commonwealth Court for consideration of the issue certified for appeal. This Court denied a Petition for Writ of Certiorari on April 4, 1994. 114 S.Ct. 1397 (1994).

On remand, in a 4-3 decision the Commonwealth Court held that the Local Taxing Authorities could not be held liable in this § 1983 action since it is the Petitioner County, not the Local Taxing Authorities, with final policymaking authority over the supervision, manner and method of assessment of real property in Berks County.

On June 19, 1995, this Court in an unrelated case, National Private Truck Council, Inc. v. Oklahoma Tax Commission, Inc., 115 S.Ct. 2351 (1995), held that "Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law." Id., 115 S.Ct. at 2355 (emphasis added). Although the Court at footnote 3 of its opinion stated that it had accepted certiorari to decide a conflict among state courts and cited, inter alia, the decision of the Pennsylvania Supreme Court in Murtagh I, it did not specifically address the issue presented in the Pennsylvania Supreme Court's decision, i.e., whether a state court could adjudicate a § 1983 class action alleging damages only arising from systematic equal protection violations.

Petitioners thereafter filed a petition seeking the Pennsylvania Supreme Court to review both the Commonwealth Court's decision and its decision in Murtagh I in light of National Private Truck Council. The Pennsylvania Supreme Court denied the petition. On January 25, 1996, Petitioners filed the instant Petition for a Writ of Certiorari.

## REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied since there is no jurisdictional basis under 28 U.S.C. § 1257(a) for review of the interlocutory orders of a state court. This Court previously denied a petition for writ of certiorari on the jurisdictional issue raised. There is no reason to change that result particularly when the decision of the Pennsylvania Supreme Court furthers state interests in avoiding a multiplicity of lawsuits by way of a class action. Furthermore, the Supreme Court of Pennsylvania reserved decision regarding whether state statutory remedies are plain, adequate and complete, and specifically limited its ruling to class actions challenging systematic practices. The narrow scope of the Pennsylvania Supreme Court's holding thus makes this case inappropriate for review. Finally, should the court disagree and grant certiorari, Respondents herein respectfully request that certiorari include the second issue raised by Petitioners; that is, whether the Local Taxing Authorities possessed final decision making authority pursuant to § 1983.

### I.

### The Interlocutory Orders Of The Pennsylvania Supreme Court And Commonwealth Court Are Not Final Judgments.

The sole basis of jurisdiction asserted by Petitioners is 28 U.S.C. § 1257(a). Under that statute, the United States Supreme Court has jurisdiction to review only "final judgments or decrees rendered by the highest court of a State in which a decision could be had...." The final judgment rule has been interpreted "to preclude reviewability...where anything further remains to be determined by a State Court...." Flynt v. Ohio, 451 U.S. 619, 620 (1981) (quoting Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945)); see also O'Dell v. Espinozo, 456 U.S. 430 (1982) (United States Supreme Court dismissal for want of jurisdiction in a § 1983 action because state

supreme court remanded case for trial). "This prerequisite to review derives added force when the jurisdiction of [the United States Supreme] Court is invoked to upset the decision of a State Court." Radio Station WOW, 326 U.S. at 124. The reason for this rule is plain: it avoids piecemeal review by the United States Supreme Court of state court decisions thereby minimizing federal court intrusion into state affairs. See Flynt, 451 U.S. at 621.

The Petition for a Writ of Certiorari filed by Petitioners is devoid of any jurisdictional basis since the orders of the Pennsylvania Supreme Court and the Pennsylvania Commonwealth Court are interlocutory.[2] By declining to grant Petitioners' petition for allowance of appeal, the Pennsylvania Supreme Court implicitly directed this matter to return to the trial court for trial. This matter is thus non-final and non-reviewable.

This case does not fall within any of the narrow exceptions of the final judgment rule mentioned by the Court in

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[2] Citing Alexander v. Mastercraft, 455 Pa. 579, 317 A.2d 278 (1974), Petitioners argue that the order dismissing the Local Taxing Authorities is considered final under state law. Petitioners are mistaken. In 1992, the Pennsylvania legislature amended Rule 341 of the Pennsylvania Rules of Appellate Procedure. Under that amended rule, an order that does not dismiss all claims and all parties is a non-final order. Moreover, the Local Taxing Authorities are not additional defendants brought into the lawsuit by Petitioners but are party defendants sued by Respondents herein. See Rules 1706.1 and 2252 of the Pennsylvania Rules of Civil Procedure. Alexander thus has been overruled by statute or, at the least, is inapposite. Petitioners reliance on Citizens & Southern Nat'l Bank v. Bougas, 434 U.S. 35 (1975) is also misplaced. There, the Court simply did not address the issue of finality under § 1257.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-85 (1975). There is no identifiable federal policy that will suffer if the state proceeding goes forward. Flynt, 451 U.S. at 622. Indeed, the federal interest in adjudicating § 1983 disputes is advanced by permitting the state trial court to finally decide the case. Nor does this case fit within the exception based upon a separate and independent issue. It cannot be said that the issue in question will survive and require decision regardless of the outcome of further state proceedings; nor, can it be said that subsequent proceedings "could not remotely give rise to a federal question...that may later come here...." Cox Broadcasting Corp., 420 U.S. at 480 (quoting Radio Station WOW, Inc. 326 U.S. at 127). Further litigation of this § 1983 case likely will raise still more federal questions.

## II.

### This Court Previously Denied A Petition For A Writ of Certiorari On The Jurisdictional Issue Raised By Petitioners. There Is No Reason To Change That Result Particularly When The Decision Of The Pennsylvania Supreme Court Furthers State Interests In Avoiding A Multiplicity Of Suits By Way Of A Class Action.

This Court earlier denied a Petition for a Writ of Certiorari based upon the very issue Petitioners seek to have reviewed. National Private Truck Council is distinguishable from this case since it did not address the specific issue decided by the Pennsylvania Supreme Court in Murtagh I: that a state court must or should adjudicate a § 1983 damage class action alleging systematic equal protection violations. National Private Truck Council addressed claims for equitable or declaratory relief only. Moreover, as this Court noted in National Private Truck Council, even equitable relief may be invoked when "enforcement of the tax would lead to a multiplicity of suits...." National Private Truck Council, 115 S.Ct. 2357, n.6. This is precisely the concern

expressed by the Pennsylvania Supreme Court in Murtagh I, 634 A.2d at 184-85 (noting that a class action challenge in this case would "significantly reduce the inconvenience, inefficiency, delay and expense involved in countless individual lawsuits over the same issue in many different administrative and judicial forums" and would avoid "the additional expense and delay typically associated with state statutory remedies without according the taxpayers the relief sought"). This finding by the Pennsylvania Supreme Court should not be disturbed since it is in a far better position than this Court to assess whether the Pennsylvania state court system is in danger of a multiplicity of suits involving the same issues of law or fact that is best addressed by a class action.[3]

## III.

### The Supreme Court of Pennsylvania's Reservation And Limitation Of Issues Renders It Inappropriate For Review By This Court.

Petitioners' petition is based upon the assumption that Pennsylvania's state statutory remedies are "plain, adequate and complete." However, in Murtagh I, the Supreme Court of Pennsylvania reserved decision regarding whether the state statutory remedies are "plain, adequate, and complete." Thus, even were this Court to grant certiorari and reverse the State

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[3] Petitioners are mistaken in alleging that Murtagh I resulted in a flood of litigation. Rather, it has been used in several of Pennsylvania's counties where entrenched politicians, elected by long term residents, refuse to order countywide reassessments. The Pennsylvania Supreme Court is correct in concluding that the class action device would reduce, rather than increase, the inconvenience, inefficiency, delay and expense resulting from challenges to any Pennsylvania county's "Welcome Stranger" policy.

Supreme Court, that court could still decide the reserved issue adversely to Petitioners. The Supreme Court of Pennsylvania also specifically limited its ruling to class actions challenging systematic property assessment practices. It left open the question of whether an individual plaintiff, as opposed to a class of plaintiffs, can maintain a § 1983 action in state court without first exhausting state statutory remedies where the challenge is to an individual assessment. This reservation and limited holding renders this case inappropriate for review. Not only is the question presented for review by Petitioners based upon an assumption of state law that has not been decided by the State Supreme Court (i.e., that the state statutory remedies are "plain, adequate and complete"), the narrowness of the State Supreme Court's holding in Murtagh I simply does not present a question sufficient to justify review by the Court at this time.

## IV.

### If The Court Were To Grant Certiorari, The Grant Should Encompass The Issue Of Whether The Local Taxing Authorities Can Be Held Liable For Having Final Decision Making Authority Pursuant To 42 U.S.C. §1983

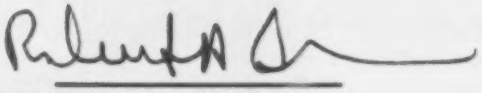
Were the Court to grant certiorari, the grant should encompass the issue of whether the Local Taxing Authorities can be held liable for having final decision making authority pursuant to 42 U.S.C. § 1983. See Jett v. Dallas Independent School District, 491 U.S. 701 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

## CONCLUSION

For all the foregoing reasons, Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari. However, were the Court to grant the Petition, the grant should include review of the issue whether the Local Taxing Authorities possessed final decision making authority pursuant to 42 U.S.C. § 1983.

February 23, 1996

Respectfully submitted,



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In The

# Supreme Court of the United States

October Term, 1995

COUNTY OF BERKS AND THE BERKS COUNTY BOARD OF ASSESSMENT APPEALS,

*Petitioners,*

*vs.*

MERRY J. MURTAGH, *et al.*,

*Respondents.*

*On Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania*

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| Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) | 1, 2, 6 |
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| Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963) | 3 |
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Statutes

Federal

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42 U.S.C. §1983 . . . . . 1-3, 5, 6

State

72 Pa. C.S.A. §5349(c) . . . . . 5

## III. INTRODUCTION

Contrary to the Taxpayers' and Municipal Defendants' position, the Court has jurisdiction to review this case now, before the federal policies outlined in National Private Truck Council, Inc. v. Oklahoma Tax Commission, Inc., 115 S. Ct. 2351 (1995), are further eroded by continued litigation in state court of the Taxpayers' claims under 42 U.S.C. §1983. Moreover, certiorari should be granted now because the improper federal interference the Court prohibited in National Private Truck Council will have already occurred if the Court postpones review until all possible proceedings in state court are completed.[1]

## IV. ARGUMENT

### A. The Court Has Jurisdiction to Hear This Appeal

The Taxpayers argue that the jurisdictional standards of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), are not satisfied and that the Court should deny certiorari to minimize "federal court intrusion into state affairs." [Taxpayers' Brief at 6].

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[1] Certiorari should also be granted to review the Pennsylvania Commonwealth Court's erroneous decision that the Municipal Defendants are not proper defendants. The County and the Board, however, believe that a reply brief is not required on that issue and instead rely on their petition for writ of certiorari.

Contrary to the Taxpayers' position, however, jurisdiction exists under Cox and the avoidance of federal interference with state affairs (in this case, local taxation) is the precise reason why the Court should grant certiorari.

Despite the possibility of further state court proceedings, jurisdiction exists under Cox because (a) the Pennsylvania Supreme Court has decided the federal issue incorrectly (the viability of Taxpayers' §1983 claims) in Murtagh v. County of Berks, et al., 535 Pa. 50, 634 A.2d 179 (1993), cert. denied, 114 S. Ct. 1397 (1994) ("Murtagh I"), and has refused to reconsider its decision in light of National Private Truck Council; (b) the federal issue will evade review if the County and Board prevail on non-federal grounds (such as the Taxpayers' failure to establish a lack of uniformity in local taxes under state law); (c) a reversal on the federal issue will preclude further litigation because the Taxpayers have asserted only a §1983 claim; and (d) a refusal to review this case now will erode the important federal policies identified in National Private Truck Council. 420 U.S. at 482-83.

The Taxpayers offer no credible argument why Cox does not apply. Instead, they claim "[t]here is no identifiable federal policy that will suffer if the state proceeding goes forward." [Taxpayers' Brief at 7]. They further argue that allowing the case to proceed in state court will advance "the federal interest in adjudicating §1983 disputes . . . ." [Taxpayers' Brief at 7].

The Taxpayers' federal policy argument could not be more at odds with National Private Truck Council, where the Court examined the long-standing federal policy of not interfering with local taxation. Under National Private Truck Council, no federal interests will be advanced by allowing this case to proceed; instead, important federal policies will be undermined by further litigation in state court.

Jurisdiction exists in cases like this, where a separate and independent federal issue (in this case wrongfully decided by the Pennsylvania Supreme Court) may determine whether a claim will proceed. Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963). There is jurisdiction here because the threshold question of whether the Taxpayers have viable §1983 claims is squarely presented in light of National Private Truck Council and the resolution of this separate and independent federal question may terminate the litigation. Mitchell v. Forsyth, 472 U.S. 511, 525 n. 8 (1985) ("state court decisions rejecting a party's federal law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. §1257.")

Finally, jurisdiction exists in cases where further proceedings remain in the state courts but an important federal interest or right protected by law cannot be vindicated without an immediate appeal. One example is Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), where the Court recognized that some rights can only be protected by immediate review

and are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

Like Cohen, this case involves rights and federal interests that cannot be vindicated without immediate review. Indeed, if this case is returned to the trial court, the federal interference with local taxation prohibited by National Private Truck Council will only continue as this case (and others like it) are litigated throughout Pennsylvania's courts.[2] Simply put, by the time the proceedings in state court are concluded, the damage to the federal policies examined in National Private Truck Council will be done. Thus, as in Cohen, because an important federal policy can only be vindicated by immediate review, the Court should grant certiorari.

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[2] The Municipal Defendants agree with the Petitioners that National Private Truck Council compels reversal, albeit in a different forum. As is evident from their Brief, however, the Taxpayers do not concede that National Private Truck Council requires the dismissal of their claims. Thus, if the case is returned to state court, protracted litigation and appeals can be expected even if the trial court dismisses the Taxpayers' claims. Such interference will be worse if the trial court refuses, despite National Private Truck Council, to dismiss the Taxpayers' claims.

## B. Important Federal and State Policies Will Be Undermined, Not Advanced, If This Case Proceeds In State Court

Ignoring the important federal policies at issue, the Taxpayers advance several non-jurisdictional arguments for denial of certiorari. For example, they claim that Murtagh I furthers state interests by allowing §1983 class actions to avoid multiplicity of suits by individual taxpayers. [Taxpayers' Brief at 7-8]. This argument should be rejected for two reasons.

First, an action like this one, seeking tax refunds for a class consisting of every taxpayer who was allegedly assessed improperly over a ten year period, is perhaps the most intrusive kind of civil action because it attempts to use a federal remedy (under §1983) in a way that threatens the fiscal integrity of local governments. No state interests are advanced by such a proceeding. Second, Pennsylvania's statutory appeal provisions allow taxpayers to challenge assessments on a class basis. 72 Pa. C.S.A. §5349(c). A §1983 class action therefore does not advance state interests; it merely replaces adequate state remedies in a manner prohibited by National Private Truck Council.

Similarly, the fact that the Murtagh I court limited its holding to class (as opposed to individual) actions does not render this case inappropriate for review by this Court. Any difference between class and individual actions is a distinction without meaning

because the maintenance of any §1983 action to challenge local taxes in Pennsylvania is improper under National Private Truck Council.

Finally, the Taxpayers claim that an unresolved issue of state law (whether Pennsylvania's statutory remedies are adequate) is grounds to deny certiorari. [Taxpayers' Brief at 8]. This argument fails for two reasons.

First, this Court has not refused to hear important cases merely because subsidiary issues (that have earlier been addressed by intermediate appellate courts), have not been addressed by a state's highest court. Indeed, the Court recognized in Cox the importance of reviewing important federal questions in cases where the determination of subsidiary or independent issues in subsequent state court proceedings might affect the outcome of a case. 420 U.S. at 482-83.

Second, the adequacy of Pennsylvania's statutory remedies is not unresolved. To be adequate, Pennsylvania's statutory remedies need only allow taxpayers to raise constitutional challenges at an administrative hearing and appeal adverse decisions to higher state courts; the remedies need not be the best or most convenient remedies. Rosewell v. LaSalle National Bank, 450 U.S. 503, 512 (1981). Pennsylvania's statutory remedies satisfy these minimal standards. E.g., Behe v. Chester County Bd. of Assessment Appeals, 952 F.2d 66, 70 (3d Cir. 1991) (examining statutory provisions).

Pennsylvania's Supreme Court addressed the adequacy issue (and the standards later established in Rosewell) over twenty years ago when it held that taxpayers may raise constitutional challenges in state court so long as they exhaust administrative remedies. Rochester & Pittsburgh Coal Co. v. Bd. of Assessment & Revision of Taxes, 438 Pa. 506, 266 A.2d 78 (1970) (examining Fourth through Eighth Class County Assessment Law); Cf. Cedarbrook Realty, Inc. v. Nahil, 484 Pa. 441, 399 A.2d 374 (1979) (Third Class County Assessment Law's procedures for administrative hearing followed by judicial review satisfy taxpayers' rights to Due Process).

Importantly, here, although the Pennsylvania Supreme Court stated that it was not deciding the adequacy issue, the Commonwealth Court in Murtagh I explicitly found Pennsylvania's statutory procedures adequate to protect the Taxpayers' constitutional rights. Greenwich Township v. Murtagh, 144 Pa. Commw. Ct. 624, 636-37, 601 A.2d 1352, 1358-59 (1992). In short, there are no unresolved state law issues that undermine the compelling reasons for granting certiorari.

## V. CONCLUSION

For the reasons set forth above, Petitioners Berks County and the Berks County Board of Assessment Appeals respectfully request the Court to grant their petition for writ of certiorari.

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